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THE ENGLISH LAW COURTS.

Fertile as London is in places and persons of interest to an intelligent foreigner, there are, perhaps, no places more interesting to an American lawyer than the English courts, and no persons whom he more desires to see than the high functionaries engaged in the administration of English law. Accustomed, as he is, to trace to England the legal maxims, principles and forms whose application is his daily concern, and which are wrought into the whole structure of the institutions and legislation of his own country; familiar, as he is, with the able and masterly adjudications of the great minds who have adorned and rendered illustrious the English bench from the earliest times, and quoting from day to day, in his own courts, as strong if not conclusive authority, the decisions emanating from those high sources, it is not without a certain thrill of admiration and awe that he finds himself standing, for the first time, in the august presence of the living dispensers of "sovereign law" to millions. The crimson canopy, adorned with the arms of England, under which the judges sit, in their flowing wigs and silken robes, the suspended sword of justice, the crowds of gowned barristers, in grave-looking wigs, the sheriffs, bailiffs and subordinate officers of the law, all distinguished by their peculiar badges, the solemn pomp with which the proceedings open, the unbroken decorum which distinguishes the whole sitting, all conspire to give impres-

siveness to the scene, when viewed for the first time. When, however, familiarity has rubbed off the edge of novelty, and the critical faculties recover from the first stunning blow, the American, with his constitutional and national habit of suggesting improvements, makes bold to notice and perhaps even to whisper into a friendly ear, several things. He observes, for example, that the courts of world-renowned Westminster Hall are very poorly accommodated; that the rooms are small, crowded, dingy and dark; that the barristers are not indulged with tables or chairs, but must sit on hard semicircular benches, and do their writing upon little shelves, six inches wide, affixed to the top of the benches before them; that the worsted gowns and heavy wigs, however well calculated to strike awe into the hearts of the ignorant vulgar, and convey an impression of the profound wisdom of the wearers, must be remarkably uncomfortable in a warm day, and that they make one look so very much like another, that the manly bearing and personal attractions of the advocate are wholly lost to his client, and that the pomp and paraphernalia in general, if they do not savor somewhat of humbug, are at any rate superfluous and might be advantageously dispensed with. Yet, in spite of all such rebellious and reformatory speculations, Westminster Hall "is and of right ought to be," the American lawyer's Mecca, and therein, with reverent heart, he pays homage as at the shrine of justice, "and not unblest departs."

This celebrated building, the hall of which is two hundred and seventy feet in length, seventy-four in width, and ninety in height, and said to be the largest room in Europe unsupported by pillars, is situated in Parliament-street, Westminster, opposite the Abbey, not far from Westminster bridge, and almost adjoining the houses of parliament. Here Richard II. received and entertained ten thousand guests at his Christmas festivals; and here the unfortunate Charles I. received sentence of death. In more recent days it has been the scene of criminal investigation in the cases of Warren Hastings and Lord Melbourne; and of splendid conviviality at the coronation of George IV. Out of this hall, on the side towards Parliament-street, open the High Court of Chancery, the Court of Queen's Bench, the Court of Common Pleas, the Court of Exchequer, the Roll's Court, and the Vice-Chancellor's Court. It is seldom that one or another of these courts is not open, and at times they are all in operation together, thronged with suitors and their counsel, and the numerous subordinate officers and hangers-on of courts of justice. They are accessible to the public, and are almost universally visited by strangers, — especially such as take

an interest in matters so dry as the methods and forms of the administration of the law.

Perhaps the most striking and noticeable characteristic of the proceedings of the English courts, is the rapid and yet not hurried manner in which the business is despatched. There is no confusion, no bustle; but there is no pause. When a cause is called on for trial, it must be at once tried or disposed of in some way. You rarely, if ever, see the counsel for one party rise at such a moment, with a pocket full of affidavits, and proceed to read them very much at his leisure, consuming the time of the court, and keeping the business waiting. "Are you ready for the plaintiff, brother Sharp?" asks the judge. "Yes, my lord," replies the barrister. "Is the counsel for the defendant ready?" No one answers. "Let a default be entered. *Brown* v. *Smith* stands next." And *Brown* v. *Smith* is on trial in a moment. The first witness takes the stand. The leader for the plaintiff rises at the same moment, and proceeds to interrogate him briskly and pointedly, and never sits till he is done with him. Meanwhile the junior is taking minutes, and there is no waiting for mending of pens, folding of papers, opening and shutting of tobacco boxes, chatting with clients or the miscellaneous hangers-on of a court-room, or laboriously reducing to writing every syllable uttered by the witness. As soon as the plaintiff's counsel has finished his interrogatories, the defendant's counsel is on his feet, and at work with great vigor; and the instant he concludes, the sharp cry of the usher, "Step down, sir," is uttered, and the witness vanishes in a second, and another takes his place.

The arguments of counsel, whether addressed to the court on questions of law or to a jury, are remarkable for brevity and point. There is no wandering from the question at issue, no waste of labor upon irrelevant or inconsequential points, no personalities, no bombast, no high-flown flourishes of rhetoric, no long-winded and pointless stories, no wearisome iteration and re-iteration of the commonplace axioms of the legal profession. Nothing can exceed the summary manner in which motions and questions of law are disposed of. It is the "ne plus ultra" of despatch, consistent with thoroughness and accuracy. In citing authorities, a barrister would as soon think of reading the litany as reading an entire case. The book, page and title of the action is given, and the sentence relied upon read, in general without more, the court being supposed to recollect the facts, and to be familiar with the reasonings. Of course, at times you hear the facts stated, but always succinctly and very briefly. The art of condensing into a nutshell, a statement

of facts which an American lawyer would feel justified in spending half a hour in narrating, seems to be perfectly understood and almost universally practised. The court are fully awake, and the barristers speak as if the motto were ever in their minds, "Millions are behind us." If you would be impressed with the value of half-hours and minutes, spend a day in Westminster Hall.

As a specimen of the manner of conducting criminal trials, take the following.

CENTRAL CRIMINAL COURT. OLD BAILEY.

Before the Recorder (Law) and Mr. Alderman Gibbs.

Charles Edwards, clerk, aged twenty-six, and William Johnson, sweep, aged twenty-one, were indicted for stealing one piece of cloth, value seventeen pounds, the property of Samuel Summers, in his dwelling-house. Johnson pleaded guilty, Edwards not guilty. The prosecutor swore to the cloth. One witness testified that he had seen the prisoner, Edwards, in the neighborhood of the prosecutor's shop. A cabman testified that Edwards bespoke a cab of him; that while he was arranging the harness, Johnson, the other prisoner, came up with the cloth and got into the cab with Edwards; that immediately the hue and cry was raised, and both of them were arrested. This was all the testimony.

In defence of himself, Edwards, (who seemed to be a Frenchman) remarked in broken English, that he knew nothing of Johnson, or of the cloth, and that he was very much surprised to find a man jumping into a cab which he had hired, and still more so to find himself held responsible for that man's crime. Johnson confirmed Edwards's statement in every particular.

Recorder. "Gentlemen of the jury — It is for you to say whether you believe the prisoner's story or not, and to return your verdict accordingly."

The jury, without leaving their seats, found the prisoner guilty.

Recorder. "What have you to say in arrest of judgment or mitigation of sentence?"

Johnson. "I should like to have time to send for my employer, who will give me a good character."

Edwards. "Me am un etranger, and does know not de laws English — never have see Johnson before dis time, and knows noting about de cloth," &c. &c.

Recorder. "I am satisfied that you are confederates. The theft was a very artful one, and it is necessary that property should be protected from artful rogues. You are each sentenced to transportation for ten years."

This trial occupied about half an hour. *Quære*—If Johnson had got into an omnibus, would every passenger in it have been liable to an indictment for larceny ?

John Higgins, chandler, aged twenty-five years, was indicted for stealing one mare, valued at twenty pounds, the property of George Rough. The prosecutor swore to his property, and two or three witnesses testified to attempts by the prisoner to sell the animal, and to contradictory accounts given by him of the way he got possession of her. The charge to the jury was substantially a repetition of the foregoing, and their verdict was the same.

Recorder, (after asking the usual question.) "John Higgins, you might formerly have been capitally sentenced. The offence was evidently premeditated. Property of this kind must be protected. You are therefore sentenced to transportation for ten years."

This trial occupied about twenty minutes.

These cases are cited, not as exemplifications of a wise administration of justice, but simply as random, and therefore impartial illustrations of the air with which business is transacted. It is very possible that each of the foregoing trials would have resulted in a verdict of guilty had they occurred in Boston or New York, but in either city, it is probable that time would have intervened between the verdict and sentence sufficient to enable the parties to show cause, if they could, why their sentence should be mitigated. But the trials themselves would perhaps have taken half a day each, and had fluent counsel been engaged, might have lasted half a week. We are a people of many words, and love sincerely to hear the sound of our own voices, and to enjoy the surprise of discovering with what ease we can string sentences together, and the reputation of having spoken for six hours or ten hours at one time and upon a single provocation. In England, however, whether at the bar or in the legislature, it is quite the reverse. The rule seems to be to use as few words as possible, and every one of them to the point.

In respect to elocution and all that comes within the phrase, "manner of speaking," the English bar can claim no superiority over our own, if indeed it be not decidedly inferior. An American is surprised to hear so few persons speak what he calls good English. The counsel for the plaintiff addresses the jury with an Irish brogue so thick and rich that you can scarce understand what he is saying ; while his antagonist replies in accents which so clearly indicate the "land o' cakes," that you can almost see its lakes and mountains. The different local dialects of England are not unrepresented, but Yorkshire responds to Devonshire, and Cornwall to

Northumberland, and London to all of them in the course of a single sitting. The gestures, too, are for the most part inelegant and awkward, the language less fluent and ready, the general air more laborious than we are accustomed to observe in our own advocates of the same relative eminence. It would seem, indeed, that very little attention had been given to the cultivation of a good style of speaking, and the utmost unconsciousness on the subject appears to prevail. So long as what he says bears upon the point, and takes the ear of the court or jury, as the case may be, the advocate seems to deem it of comparatively trifling importance how he says it. On he goes, cutting and slashing away at the queen's English, nominative cases seeking in vain for agreeing verbs, parenthesis within parenthesis, broken sentences remorselessly left to gather up their *disjecta membra* as they can, but all the while never forgets a fact or point that makes for his own case, or which can be turned to advantage against his adversary. The argument is never lost sight of. With many of our speakers, on the contrary, it would be difficult to collect the fragmentary morsels of argument which float upon the rushing tide of their mellifluous eloquence, and we often feel inclined to repeat, in reference to their efforts, the criticism of the clown, who had read through the dictionary, — "the words are very good, but I don't quite understand the story."

Nor are the bar alone entitled to the credit of brevity and conciseness. The same characteristics distinguish the bench, and in an equally high degree. When the court takes time to consider, the case is indisputably one of some intricacy. Motions involving the rights and franchises of cities, boroughs and gigantic corporations, affecting immense sums of money, determining questions of the deepest public and private interest, and hinging often upon very nice points of technical law, are settled instantly upon the termination of the arguments, and judgment pronounced extemporaneously, and in the fewest possible sentences. No time is taken to draw up diffuse disquisitions upon every single point of law, which may have been mooted in the course of a hearing. Nor is it deemed necessary that the judge, on every occasion, should exercise his learning and attainments by fortifying each successive point, doubtful or not, with a long array of authorities. But he seems to feel that his time belongs to the public, and that he has no right to employ it but in their service. Business presses and must be done, — not talked about, but performed, finished. Great interests always stand waiting, great in the amounts of property involved, the number of persons affected and the legal

principles at issue. Expedition, therefore, which is generally a convenience and sometimes a virtue, is there a necessity. Yet is this expedition attained not by whipping and spurring, not by sharp and brilliant anticipations of what witnesses or counsel could say, not by arbitrarily cutting cases short and summarily silencing remark. The necessities of society, if nothing better, have taught all concerned in the administration of the law their true places and functions, and they seem to conspire harmoniously in effecting the grand results for which laws are made and courts of justice established. The "patience and gravity of hearing" which Bacon commends, his successors well illustrate. The natural consequence is, that they are addressed by the bar with uniform courtesy and respect, and listened to with marked deference. Business is thus done pleasantly as well as expeditiously; and good temper and good manners may be learned not less than good law. Of course, these remarks are to be understood *generally*. Particular exceptions doubtless exist, but they do not deserve to be noted, as they do not mar the total impression upon the mind of a stranger.

On the whole, no lawyer can visit the courts of Westminster Hall, and watch the course of business day after day, without being as forcibly impressed with the learning, labor and ability of the men who fill the high judicial stations of England, as with the magnitude and intrinsic importance of the causes which come before them for decision. Nor can he well depart without feeling that a wise and able administration of the law is one of the chief glories of an enlightened state, and that no expenditure can be deemed excessive which may be necessary to secure the highest character and ability for the performance of the arduous duties of the judge. The English judges have "permanent and honorable salaries," and therefore they are what they are. To the citizen of Massachusetts, the reflection can hardly fail to occur that, in his own state, the amount of judicial compensation is carefully calculated and grudgingly doled out, and that the retrenchment of a few hundred dollars in this item of public expenditure, is thought to constitute a valid title to public gratitude on the part of its perpetrators. It is, however, somewhat consolatory to know that badly as our judges may be treated, and poorly as they may be paid, the judicial office has thus far fallen upon men of sufficient weight of character to resist these sinister influences, and that nowhere, perhaps, is justice more ably, wisely, uncorruptly and mercifully administered than in the commonwealth of Massachusetts.

Recent American Decisions.

Superior Court of Judicature, New Hampshire, Rockingham, July Term, 1844.

Kittredge *v.* Emerson.

In alleging an attachment of property, in a replication to a plea of discharge in bankruptcy, it is not necessary to set forth the delivery of the summons ; and if it be alleged that a summons was delivered, on a day before the writ was sued out, it may be rejected as repugnant, and surplusage.

The delivery of the summons, in the service of a writ of attachment, is not a part of the attachment itself, which is to be made before the summons is delivered. The delivery of the summons is necessary to complete the service of the writ, and to require the defendant to answer to the action.

Defects in the service of the writ are cured, by a general appearance and a plea to the merits.

The court is bound to give such judgment as appears upon the whole record to be proper, without regard to any imperfection in the prayer of judgment.

The doctrine of *Kittredge* v. *Warren*, decided on the last circuit, re-examined and affirmed. That doctrine is that —

" An attachment of property on mesne process, *bonâ fide* made, before any act of bankruptcy or petition by the debtor, is a lien or security upon property, valid by the laws of this state ; and thus within the proviso of the second section of the bankrupt act of August 19, 1841.

" The attachment being saved by the proviso, the means of making it effectual are also saved; and the certificate of discharge of the bankrupt cannot, when pleaded, operate as an absolute bar to the further maintenance of the action. If so pleaded, the plaintiff may reply the existence of the attachment; in which case a special judgment will be entered, and execution issued against the property attached."

The judgment of a court, in one of the United States, having jurisdiction of the cause and of the parties, is binding and conclusive upon parties and privies in every other court in the United States, until it is regularly reversed by some court having jurisdiction for that purpose.

But the judgment or order of a court having no jurisdiction of the subject matter, is entirely void.

The courts of the United States cannot lawfully treat as nullities the judgments of the courts of the several states, rendered in suits where the latter have jurisdiction of the cause and the parties, even if they were founded upon an erroneous construction of the bankrupt act, or any other statute of the United States. The remedy for the correction of the error is by writ of error in the supreme court of the United States.

The jurisdiction of the district courts of the United States, to issue injunctions to stay proceedings in suits pending in the courts of the several states, because the defendants have filed petitions in bankruptcy, may be inquired into in the state courts; and if it is found that the district court has acted without authority, the injunction may be disregarded, or the parties be enjoined from attempting to enforce it.

The courts of the United States, and the judges of those courts, are restrained by general laws from issuing injunctions to stay proceedings in any court of a state.

Whether the district courts of the United States have authority, in any case under the bankrupt act, to issue an injunction to stay proceedings in a state court, *quere?* *It seems* they have not.

However this may be, no such authority exists to stay proceedings, after the bankrupt has obtained and pleaded his discharge, in bar of the action against him.

The circuit or district courts of the United States, sitting in bankruptcy, have no authority to stop the execution of the final process of the courts of the several states, or to interfere with the proceeds of a sale of property on the execution.

Where cases are pending in the courts of this state, in which an attachment of property was *bonâ fide* made upon the writ, before any act of bankruptcy by the defendant, and the defendant has obtained and pleaded his discharge in bankruptcy, the assignee, and all claimants of the property attached, may be enjoined from attempting to procure any process, from any court which is not acting under the authority of this state, with a view to prevent the entry of judgments in such suits, or to prevent the execution of the final process issued upon the judgments when obtained; and also from applying for, or attempting to execute any summary process, order, or decree of any court, with the view and purpose of taking from the creditors, or their attorneys, the fruits of such judgments as they may obtain, on account of any supposed want of right in the court to render those judgments, or any supposed invalidity of such judgments, so long as they shall remain in full force and unreversed. And all persons may also be enjoined and prohibited from making any application, or instituting any proceedings, founded on any supposed breach of an injunction or order issued by any tribunal not acting under the authority of this state, by reason of any proceedings in the courts of this state, arising after the bankrupt has pleaded his discharge.

Assumpsit, upon an account annexed to the writ. At the court of common pleas, February term, 1843, the defendant pleaded in bar of the further maintenance of the action, that on the 26th day of April, 1842, he resided in, and was a citizen of this state, that he was owing debts which he was unable to pay, and on that day, by petition, applied to the district court of the United States for the district of New Hampshire, for the benefit of the act of congress of the United States, entitled "an act to establish a uniform system of bankruptcy throughout the United States;" that he was, on the 22d of June, 1842, by a decree of said court, duly

declared a bankrupt; that on the 24th of said June he filed his petition, praying that he might be decreed to have a full discharge from his debts, provable under his bankruptcy, and a certificate thereof granted to him; and that on the 16th of November, 1842, and since the last continuance of this action, a full discharge from all his debts was decreed and allowed by said district court, and a certificate thereof, under the seal of said court, was duly granted to him accordingly. The plea set forth the proceedings in bankruptcy, at large, and averred that the several causes of action in the declaration mentioned, accrued to the plaintiff before the defendant filed his first petition, and were provable under said act of congress. Wherefore the defendant prayed judgment, &c.

To this plea the plaintiff replied, at the August term, 1843, that he ought not to be precluded from maintaining his action, because that in and by the plaintiff's writ, in the action aforesaid, called a writ of attachment, and sued out in due form of law, on the 29th of March, 1842, the sheriff of any county in this state, or his deputy, was commanded, among other things, to attach the goods or estate of the defendant, to the value of three hundred dollars; that on the same day he delivered his writ to a deputy sheriff for said county of Rockingham, to be by him duly executed, who on the 30th of the same March, by virtue thereof, attached all the right, title, and interest of the defendant in certain real estate, bounded, &c., and left an attested copy of the writ and of his return with the town clerk, and on the 5th of March, 1842, left a summons in the action at the last and usual place of abode of the defendant, &c., all which it was alleged, fully appeared by the return of said deputy upon the writ. The replication then averred, that at the time of the attachment the defendant was seized and possessed of certain rights in the premises of great value, to wit, of the value of three hundred dollars, &c.; that the plaintiff, by virtue of the attachment aforesaid acquired, and still has, and ought to have a lien upon the premises so attached, and the rights of the defendant therein at the time of the attachment, within the meaning and intent of the said act of congress, and that the plaintiff is not divested or deprived of said lien, by anything alleged in the plea, but is entitled to prosecute this action to final judgment and execution, for the purpose of effecting a levy upon the rights of the defendant attached as aforesaid. Wherefore he prayed judgment for his damages, &c.

To this replication the defendant demurred specially, assigning for causes that the plaintiff had not set forth the value of the defendant's interest in each parcel of the estate alleged to have been

attached on the plaintiff's writ; and that the prayer of judgment in the replication is for the full amount of damages sustained by the plaintiff, by reason of the non-performance of the promises set forth in the declaration, and is not limited to the amount of the value of the defendant's interest in the estate attached on the plaintiff's writ.

The questions arising in these pleadings were saved, and transferred to this court for decision.

Porter and *Pillsbury*, for the plaintiff.

H. F. French, for the defendant.

Parker C. J. in delivering the opinion of the court, passed upon several points, (which appear in the abstract of this case, ante, pp. 312, 313) and then proceeded to reëxamine and affirm the decision of this court in the case of *Kittredge* v. *Warren* (ante, p. 77). He also examined at much length the case of *Ex parte Bellows & Peck*, (ante, p. 119,) and concluded as follows:

Having carefully examined the opinion in *Ex parte Bellows & Peck*, we find nothing in it which addresses itself to our judgment as a fair argument against the opinions expressed by us in *Kittredge* v. *Warren*, and we therefore adhere to the decision in that case, with as undoubting confidence as we can hold to anything else similarly situated. And the belief that that case commends itself very generally to the approbation of the profession in this state, and also to that of gentlemen of eminent professional standing elsewhere, certainly adds, in no small degree, to the confidence we have in its correctness. That decision is subject to the revision of the supreme court of the United States. If there reversed, we shall be bound to treat it as erroneous, whatever of support it may have received in other quarters. Until thus reversed, we shall regard it as sound, unless it is impugned by something beyond what we have yet seen.

The opinion thus expressed settles the judgment which is to be entered in this case, and we should have been well content if we might have stopped here. But there is further matter in the opinion in the case of *Bellows & Peck*, of a character which may well astonish, if it does not alarm us, and which we cannot pass by in silence upon the present occasion.

According to that opinion, the judgment which is to be entered in this case is to be treated as a nullity in the district court of the United States for this district, if the defendant, or his assignee,

sees fit to apply there; and that court, by means of injunction and summary process, may not only restrain the parties, and the officers of the law, from executing the final process of the courts here, issued according to the laws of the state, in cases in which those courts have a clear and undisputed jurisdiction over the cause and the parties, but may, also, by some summary process, search the pockets of the attorneys and creditors, and take from them, what, under the administration of justice in this state, and in pursuance of the judgments of its courts, has been paid over to them as their property.

That we may not be supposed to have mistaken the import of the language used, we subjoin some further extracts from that opinion.

"When," says the learned judge, "a personal action is pending at the suit of any creditor, in a state court, in which an attachment has been made on the writ, and the period has not passed at which the bankrupt is not properly in court, and is entitled, if he obtains a discharge in bankruptcy, to plead it as a bar of the suit, in the nature of a plea *puis darrein continuance*, it becomes the duty of the court, upon his own application, or that of his assignee, by petition, to grant an injunction against the creditor, to stay further proceedings in the suit until the further order of the court." (7 *Law Reporter*, 129.) Again: "If the bankrupt obtains his discharge, and pleads it as a bar, and the creditor means to contest its validity, as by replying fraud, or that the debt is not otherwise within the discharge, then the creditor should apply to the district court for leave to proceed in the cause, and to try the validity of the discharge by a trial in the state court, which is granted as a matter of course, upon suitable proof and affidavits. If the validity of the bar is established by the verdict of the jury, that of course ends the right to proceed in the suit, unless a new trial is granted. If the discharge is avoided for fraud, or other matter *in pais*, then of course it is no bar, and there is an end of the defence, unless a new trial is granted. But if the validity of the discharge, as such, is not contested, and the state court should, as in the case of *Kittredge* v. *Warren*, upon a demurrer, hold the discharge invalid as to the property attached, I have no doubt that it would be the duty of the district court to grant an injunction against the creditor, his agents, attorneys, and the sheriff holding the attached property, to restrain the creditor from proceeding to judgment; or, if he has proceeded to judgment and execution, to restrain the sheriff from levying on the property on the execution; and if the property has been sold by the sheriff, to compel him to

bring the proceeds into court. And it will be no excuse or justification to the sheriff, after notice, that he has paid over the proceeds to the creditor, or his agents or attorneys. And the proceeds may be followed by the proper district court into the hands of the creditor, and his agents and attorneys, wherever he or they may reside. Such, I do not scruple to affirm is, and should be, the practice." *Ibid.* 130. Again: "I understand, indeed, that already an injunction has gone against the plaintiffs in the various suits in the state court, referred to in the petition. But as it is neither suggested nor stated upon the case adjourned into this court, no notice of it can be here judicially taken. But this much I may say, that if such an injunction has been awarded, it is not competent for the creditors to take a single step in their suits in the state court, unless under the direction and order of the district court; for otherwise it would be a breach of the injunction." *Ibid.* 131. (*Sed vide* 5 *Law Reporter*, 73). And again: "In case the state court, not contesting, but admitting, that the discharge of the bankrupts was obtained *bonâ fide* and without fraud, and as such is valid, as a discharge from the debts provable under the bankruptcy, should nevertheless proceed to award judgment for the plaintiffs in the said suits for their debts so provable, on account of such attachments therein, then that such judgments ought to be treated as a nullity by the district court, and as not binding therein. And that therefore it will become the duty of the district court, upon the petition and application of the assignee of the bankrupts therefor, to direct an injunction to the plaintiffs in such suits respectively, (if such injunction has not already issued,) prohibiting them respectively from levying any executions on the said judgments, or any of them, upon the property attached in said suits; and at the same time to direct an injunction to the petitioners, prohibiting them or either of them from proceeding to levy the same executions on the property so attached, or any part thereof, but to deliver up the same forthwith to the assignee of the said bankrupts, to be distributed as a part of the assets of the said bankrupts. And if any of the said executions shall have been by them levied upon the said property attached, then to pay the moneys raised thereby into the said district court." *Ibid.* 132.

That conclusions of a character so novel, and of such vital consequence to the state jurisdictions, should be put forth without a statement of some, at least, of the reasons upon which they are founded, was hardly to be expected. But the reasons are not to be found, unless, perchance, they are contained in the following

clause of the same opinion: "It it would be an utter renunciation," it is said, "of the rightful authority and jurisdiction of the courts of the United States, to allow any creditor to avail himself of any unjust and unlawful advantage, merely because his suit is depending in a state court. The laws of the United States are, to the extent of the constitutional limits, paramount to the authority of those of the states. The courts of the United States are the appropriate expounders of the laws of the United States, and are not bound to follow the exposition of these laws by the state courts, unless so far as they approve themselves to their own judgment." *Ibid.* 130.

If this is to be regarded as the premises and reasons from which the conclusions are derived, and we are to understand that, therefore, the district court should treat the judgments of the state courts as nullities, and attempt the exercise of the powers which it is said it is its duty to exercise, we must say that in our opinion, the foundation will by no means sustain the superstructure. But, whatever may be the ground upon which the doctrine is promulgated, the plaintiffs in this and other actions similarly situated, with this matter before them, may well ask of us, whether the judgments entered in their favor, in pursuance of our opinions, are mere waste paper; and whether we have no power to enforce our own judgments, so long as they remain unreversed?

If the right existed, to treat the judgments of this court as nullities, because there was some error in our construction of the bankrupt act, there could be, as it seems to us, little excuse for the exercise of that right, by way of summary process, in any case of doubtful construction; and still less in a case where the construction adopted by this court is the same with that upon which the courts of the United States, in the adjoining circuit have, and do still, administer their jurisdiction under that act. That a judgment of a state court, rendered upon one side of the Connecticut river, should be held as a nullity, under the operation of a law of the United States, when a like judgment, rendered on the other side of that river, founded on a similar state of facts and of law, is held valid and binding, would, certainly, not only present an astonishing exposition of the law, but also a singular exhibition of judicial courtesy, if there is any liberty for the exercise of a discretion in this matter; and we think that those who hold to the conclusions put forth in *Ex parte Bellows & Peck*, will look in vain for anything in the act, or in the nature of the case, imposing such a course of proceeding upon them as an imperative duty. The course is clearly open by which, in the regular mode of a writ of

error, the question, which of two conflicting constructions is correct, may be readily determined. It may be said, however, that matter of this character addresses itself to the consideration of others, rather than of ourselves. We have certainly no desire to press it, because we prefer to consider this doctrine upon other grounds.

The assumption is, that the district court ought to treat the judgments of the courts of this state as nullities — not as it may be found that those courts had jurisdiction, or otherwise; but according as the district judge, acting under the light of *Ex parte Foster* and *Bellows & Peck*, may be of opinion that the courts rendering them have, or have not, exercised their jurisdiction wisely, on the pleadings before them. This is a new species of nullification.

It is evident, from what has been already stated respecting the decisions elsewhere, that the result of this doctrine, if carried into practice, would be, that a judgment of a court here, having jurisdiction of the matter, if carried into Vermont as a justification for acts done under it, would be held by the United States' courts there, as well as the courts of that state, to be valid, and binding, and conclusive evidence; and not only so, but one founded in a correct exercise of judicial power, and a sound exposition of the bankrupt act; while within the limits of this state, where it was rendered, other United States courts would regard it as entirely void — a mere nullity. And this result would be attained under the operation and administration of a law, which, in order to be itself constitutional, must be a uniform law throughout the United States. The result need only be stated to give a character to the doctrine.

This pretension, thus put forth, (so far as we are aware, for the first time,) that the circuit or district courts of the United States may treat the judgments of the courts of the several states as nullities, whenever in their opinion those judgments are founded upon, or involve, an erroneous construction of a law of the United States, it is believed, has nothing either of principle or authority to sustain it.

In all the suits which have come under our notice, the court where these actions are pending had, on the institution of the suit, jurisdiction of the cause and of the parties. The actions were duly commenced and entered, and the jurisdiction was most unquestionable. It has not been lost by any subsequent change in the relation or condition of the parties. *The United States* v. *Meyers*, (2 Brocken. R. 516); *Dunn* v. *Clark*, (8 Peters R. 3);

1 Fairfied R. 291; *Clarke* v. *Matthewson*, (2 Sumner's R. 262, and cases cited). It is not lost because the defendants have filed a petition in bankruptcy, nor by reason of their having obtained a certificate. That certificate must be pleaded, and its validity may in some way be contested. Had the plaintiff in this case replied, that the certificate was fraudulently obtained, no doubt seems to be expressed in *Ex parte Bellows & Peck*, that a judgment, entered upon a verdict finding such an issue in favor of the plaintiffs, would be valid and binding upon parties and privies.

If, instead of a replication that the certificate was inoperative by reason of fraud, the plaintiffs reply some other matter, avoiding as they say its operation as a bar of the action, that does not affect the jurisdiction of the court, which must thereupon proceed to hear, or try, and to render such judgment as it may deem legal and just upon the premises. If that judgment is founded upon an erroneous view of the matter in controversy, it stands as the judgment of a court of competent jurisdiction, and is equally binding upon parties and privies, until regularly reversed, as one rendered upon any other replication in avoidance of a plea. *Smith* v. *Knowlton*, (11 N. H. Rep. 198); *Fisher* v. *Harnden*, (1 Paine's C. C. R. 58); *Green* v. *Sarmiento*, (1 Peters C. C. R. 79); *Field* v. *Gibbs*, (1 Peters C. C. R. 79); *Bissell* v. *Briggs*, (9 Mass. R. 462); *Commonwealth* v. *Green*, (17 Mass. R. 445); *Hall* v. *Williams*, (6 Pick. R. 241); *Hall* v. *Williams*, (1 Fairf. R. 278); *Adams* v. *Rowe*, (2 Fairf. 89); *Bannister* v. *Higginson*, (2 Shep. R. 73, 78); *Hoxie* v. *Wright*, (2 Verm. R. 263, 268); *Wallbridge* v. *Hall*, (3 Verm. R. 114, 119); *Kellogg*, *ex parte*, (6 Verm. R. 509, 511); *Gilman* v. *Thompson*, (11 Verm. R. 643, 648); *Slocumb* v. *Wheeler*, (1 Conn. R. 449); *Andrews* v. *Montgomery*, (19 Johns. R. 162); *Starbuck* v. *Murray*, (5 Wend. R. 148); *Shumway* v. *Stillman*, (6 Wend. 447; 1 Kent's Com. 260; 3 Cowen's Phil. Ev. 897, and cases cited; Story's Conflict of Laws, 463, and note).

Such is the general principle to be found in the books. And by no court has this principle been more emphatically laid down, than by the supreme court of the United States.

"Where a court has jurisdiction, it has a right to decide every question which occurs in the cause; and whether its decision be correct, or otherwise, its judgment, until reversed, is regarded as binding in every other court. But if it act without authority, its judgments and orders are regarded as nullities. They are not voidable, but simply void, and form no bar to a recovery sought,

even prior to a reversal, in opposition to them. They constitute no justification; and all persons concerned in executing such judgments or sentences, are considered in law as trespassers." *Elliot* v. *Piersol*, (1 Peters R. 340.)

"The general and well settled rule of law in such cases, is, that when the proceedings are collaterally drawn in question, and it appears upon the face of them that the subject matter was within the jurisdiction of the court, they are voidable only. The errors and irregularities, if any exist, are to be corrected by some direct proceeding, either before the same court to set them aside, or in an appellate court. If there is a total want of jurisdiction, the proceedings are void and a mere nullity, and confer no right, and afford no justification, and may be rejected when collaterally drawn in question." *Thompson* v. *Tolmie*, (2 Peters R. 163).

"A judgment or execution, irreversible by a superior court, cannot be declared a nullity by any authority of law, if it has been rendered by a court of competent jurisdiction of the parties and the subject matter, with authority to use the process it has issued: it must remain the only test of the respective rights of the parties to it. If the validity of a sale under its process can be questioned for any irregularity preceding the judgment, the court which assumes such power places itself in the position of that which rendered it, and deprives it of all power of regulating its own practice or modes of proceeding, in the progress of a cause to judgment. If after its rendition it is declared void for any matter which can be assigned for error only on a writ of error or appeal, then such court not only usurps the jurisdiction of an appellate court, but collaterally nullifies what such court is prohibited by express statute law from even reversing." *Voorhies* v. *The Bank of the U. States*, (10 Peters R. 474).

"It remains only then to inquire in every case what is the effect of a judgment in the state where it is rendered? In the present case, the defendant had full notice of the suit; for he was arrested and gave bail, and it is beyond all doubt that the judgment of the supreme court of New York was conclusive upon the parties in that state. It must, therefore, be conclusive here also. *Mills* v. *Duryee*, (7 Cranch R. 484.) See also *Rose* v. *Himely*, (4 Cranch, 241, 269); *Kempe's Lessee* v. *Kennedy*, (5 Cranch, 173); *Hampton* v. *McConnell*, (3 Wheat. R. 285); *Hopkins* v. *Lee*, (6 Wheat. 113); *McCormick* v. *Sullivant*, (10 Wheat. 199); *United States* v. *Arredondo*, (6 Peters R. 729); *Cocke* v. *Halsey*, (16 Peters R. 87).

There is nothing that we discover, to take the cases now pending in the courts of this state out of the general principle. If the judgments are binding upon the bankrupts, they cannot be treated as nullities by the assignee in bankruptcy. He must claim under the bankrupts, by a transfer subsequent to the attachment. He may in all such cases, by virtue of the provision of the bankrupt law, come in, as a party to the suit. He can, therefore, in no wise be regarded as a stranger to the judgment which may be rendered. He can avail himself of any judgment which shall be rendered against the plaintiff. Even if he could be regarded as a stranger, that would not make the judgments nullities. It would only show, that in some proper proceeding, he might aver that the judgments were not binding upon him.

Now will it do to say that the judgments, if rendered in favor of the plaintiffs, are frauds upon the bankrupt act, and therefore void. The doctrine of fraud, in the avoidance of judicial proceedings, does not extend quite so far. To warrant that, there must be, not mistake of the court, but covin, collusion, or falsity of the party. *The Duchess of Kingston's Case*, (11 State Trials, 198, cited Hale's Hist. Com. Law, 31, 38, note D); *United States* v. *Arredondo*, (6 Peters R. 716); *Atkinsons* v. *Allen*, (12 Vermont R. 619, 624.)

The considerations and authorities we have thus adverted to are quite sufficient to warrant us in saying, that we cannot recognize the right of any court to treat our judgments, rendered in cases where we have a clear jurisdiction, as mere nullities.

But the position that the judgments of courts having jurisdiction of the cause and the parties, may be treated as nullities, thereby precluding the necessity of what might prove an unsuccessful attempt to procure their reversal, is not, as we have seen, the only extraordinary conclusion found in the case of *Bellows & Peck*.

It is not directly asserted, but it may perhaps be inferred from what we have before quoted, that the district court, in fear lest the state courts should go wrong in the matter, may, through the means of an injunction already granted upon the plaintiffs, restrain the state courts from considering any replication, but such as the district court may deem suitable and proper for their judgment. Notwithstanding the defendant has obtained his discharge, and comes in and pleads it, the plaintiff it seems is not to be at liberty to reply to the plea, except by permission of the district court. It does not distinctly appear, whether, if the plaintiff proposes to file a replication setting forth an attachment, leave

will be refused to him to proceed further in the cause; but such a course seems to be shadowed forth in the extracts, we have made.

Subsequently to the time when the bankrupt act went into operation, it necessarily came to our knowledge that injunctions were, from time to time, issued by the district court, for the purpose of restraining plaintiffs from proceeding, in actions pending in the state courts, the defendants having filed petitions in bankruptcy; and we were fully aware that the jurisdiction thus exercised was particularly odious to the parties, and counsel, upon whom such process was served. No small impatience was manifested upon the subject; but no matter was presented to this court, or to any of the several members of it, for any action, relative to such process.

When *Kittredge* v. *Warren* was decided, we made no examination into this subject. It was in no way necessary, or important, to the settlement of that case. We were content to take it for granted, that there might be some foundation for a power which had been so freely exercised. We admitted, in that case, that if doubts existed respecting the validity of the demand upon which a suit had been commenced, and an attachment made, it might be proper, if the defendant had gone into bankruptcy, to restrain the prosecution of the suit until provision could be made for defending it; and we made no inquiry whether the authority to issue such an injunction resided in the courts of the United States, or was confined to those of the state.

We have no controversy with the learned judge of the district court, for what has passed in this respect. In issuing the injunctions, thus far, he has undoubtedly acted on what seemed to him to be a sufficient opinion upon that subject.

But the pretension now set up, in *Ex parte Bellows & Peck*, is of a much more important character. It is, as we have already seen, no less than an assertion of a right and power in the district court to enjoin parties from proceeding to final judgment in the courts of the state, in cases where, in our opinion, they are entitled to judgments on the record before us — to restrain the execution of our final process, in the hands of the sheriff — to require him to account in the district court, instead of returning his process to the court from which it issued — or if, perchance, the proceeds of a sale on execution have passed from his hand, to follow them, like goods taken tortiously, wherever they may be found.

Such, the learned judge, in *Bellows & Peck* "does not scruple to affirm, *is*, and should be, the practice."

We can only say that this is the first time we have ever heard of any such practice, and we trust, with great confidence, that it will be the last.

The power thus asserted is one of tremendous import, and the authority for its exercise should be most clear and indisputable. We cannot consent that this claim to interfere with the jurisdiction, legal proceedings, laws, and practice, of the several states should pass unchallenged, and we propose to inquire at this time somewhat into its foundation.

The general question, of the right of the district court to issue an injunction to stay proceedings in a state court in any case, is disposed of, in a very summary manner, in the case of *Bellows & Peck*. "In respect" (it is said) "to the right of the district court to issue such an injunction, it seems to me clear in principle, and it is a question of which that court had exclusive cognizance, and it is not a matter inquirable into elsewhere, whether the jurisdiction was rightfully exercised or not." (7 *Law Reporter*, 124.)

If, by this, it is intended that there is no appeal from the decision of the district court in this matter, it is undoubtedly correct; but if it is intended that the courts of the states cannot inquire into the jurisdiction of the district court to issue such injunctions, and if it be found that no such right exists, act upon the result of that inquiry, the assertion is most respectfully, but distinctly, denied. That the jurisdiction may be inquired into, is too clear to admit of doubt 1 Peters Sup. C. R. 340; 2 Peters, 164; 4 Cranch, 241, 268; 1 Conn. R. 427, 441–457; 9 Mass. R. 462; 17 Mass. R. 545; 6 Pick. 241, 247; 3 Verm. R. 119; 11 Verm. R. 647; *Stoughton* v. *Mott*, (13 Verm. R. 182); *Wheelwright* v. *Depeyster*, (1 Johns. R. 471, 484); *Borden* v. *Fitch*, (15 Johns. R. 121); *Bates* v. *Delavan*, (5 Paige Ch. R. 299, 305); *Cheriot* v. *Foussat*, (3 Binney R. 220, 250); 1 Kent's Com. 410; Story's Confl. of Laws, 509, 461, note.

When it is settled that the district court has jurisdiction to issue injunctions, to restrain proceedings in the state courts, its decree, in that particular, must be held conclusive, if it does not exceed the limits of the jurisdiction. *Gelston* v. *Hoyt*, (3 Wheat. R. 312.)

Provision for the exercise of the judicial power conferred by the constitution of the United States, was made in the act of congress of September 24, 1789, to establish the judicial courts of the United States, usually termed the judiciary act.

The 25th section provides, that in certain cases, there enumerated, the final judgment or decree in any suit, in the highest court of law or equity of a state in which a decision of the suit could be

had, may be reëxamined, and revised, or affirmed, in the supreme court of the United States, upon a writ of error; (1 Laws U. S. Story's Ed. 61,) and we admit that our judgments, involving the construction of the bankrupt law, in its operation upon attachments, are within the provisions of this section.

The 14th section of the act confers upon the supreme, circuit and district courts, power "to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law. And that either of the justices of the supreme court, as well as judges of the district courts, shall have power to grant writs of *habeas corpus*, for the purpose of an inquiry into the cause of commitment. — *Provided*, that writs of *habeas corpus* shall, in no case, extend to prisoners in jail, unless where they are in custody under or by color of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify." *Ibid.* 59.

But congress did not deem it necessary, to the exercise of any rightful jurisdiction of the circuit or district courts, that they should have any authority to issue injunctions to stay proceedings in the state courts. The 5th section of an act passed March 2, 1793, in addition to the act of 1789, enacts, "That writs of *ne exeat*, and of injunction, may be granted by any judge of the supreme court, in cases where they might be granted by the supreme or a circuit court; but no writ of *ne exeat* shall be granted, unless a suit in equity be commenced, and satisfactory proof shall be made to the court or judge granting the same, that the defendant designs quickly to depart from the United States; nor shall a writ of injunction be granted to stay proceedings in any court of a state; nor shall such writ be granted in any case, without reasonable previous notice to the adverse party, or his attorney, of the time and place of moving for the same." *Ibid.* 311.

An act of February 13th, 1807, to extend the power of granting writs of injunction to the judges of the district courts, enacted "That, from and after the passing of this act, the judges of the district courts of the United States shall have as full power to grant writs of injunctions, to operate within their respective districts, in all cases which may come before the circuit courts within their respective districts, as is now exercised by any of the judges of the supreme court of the United States, under the same rules, regulations, and restrictions, as are prescribed by the several acts of congress establishing the judiciary of the United States, any

law to the contrary notwithstanding: *Provided*, That the same shall not, unless so ordered by the circuit court, continue longer than to the circuit court next ensuing; nor shall an injunction be issued by a district judge in any case where a party has had a reasonable time to apply to the circuit court for the writ." (2 U. S. Laws, Story's Ed. 1043.)

The district courts are specially authorized to issue injunctions in certain cases relating to the administration of the treasury department.

These seem to have been all the provisions which congress had seen fit to enact upon this subject previous to the passage of the bankrupt law.

That eminent jurist, Mr. Chancellor Kent, speaking of the supreme court of the United States, says, "This court, and each of its judges, have power to grant writs of *ne exeat* and of injunction; but the former writ cannot be granted unless a suit in equity be commenced, and satisfactory proof be made that the party designs quickly to leave the United States; and no injunction can be granted to stay proceedings in a state court, nor in any case without reasonable notice to the adverse party." (1 Kent's Com. 300.)

Upon a subsequent page he says, "It has also been adjudged, that no state court has authority or jurisdiction to enjoin a judgment of the circuit court of the United States, or to stay proceedings under it. This was attempted by a state court in Kentucky, and declared to be of no validity by the supreme court of the United states, in *McKim* v. *Voorhis*. No state tribunal can interfere with seizures of property made by revenue officers, under the laws of the United States; or interrupt by process of replevin, injunction, or otherwise, the exercise of the authority of the federal officers; and any intervention of state authority for that purpose is unlawful. This was so declared by the supreme court in *Slocum* v. *Maberry*, (2 Wheaton, 1.) But if there be no jurisdiction in the instance in which it is asserted, as if a marshal of the United States, under an execution in favor of the United States against A, should seize the person or property of B, then the state courts have jurisdiction to protect the person and the property so illegally invaded; and it is to be observed, that the jurisdiction of the state courts in Rhode Island was admitted by the supreme court of the United States, in *Slocum* v. *Maberry*, upon that very ground." (1 Kent's Com. 410.)

"But," he says farther, "while all interference on the part of the state authorities, with the exercise of the lawful powers of the

national government, has been, in most cases, denied, there is one case in which any control by the federal over the state courts, other than by means of the established appellate jurisdiction, has equally been prevented. In *Diggs & Keith* v. *Wolcott*," (4 Cranch, 179,) " it was decided generally, that a court of the United States could not enjoin proceedings in a state court; and a decree of the circuit court of the United States for the district of Connecticut was reversed, because it had enjoined the parties from proceeding at law in a state court. So in *Ex parte Cabrera*," (1 Wash. Cir. Rep. 232,) " it was declared, that the circuit courts of the United States could not interfere with the jurisdiction of the courts of a state. These decisions are not to be contested; and yet the district judge of the northern district of New York, in the spring of 1823, in the case of *Lansing and Thayer* v. *The North River Steamboat Company*, enjoined the defendants from seeking in the state courts, under the acts of the state legislature, the remedies which those acts gave them. This would appear to have been an assumption of the power of control over the jurisdiction of the state courts, in hostility to the doctrine of the supreme court of the United States. In the case of *Kennedy* v. *Earl* of Casillis, an injunction had been unwarily granted in the English court of chancery, to restrain a party from proceeding in a suit in the court of sessions in Scotland, where the parties were domiciled. It was admitted, that the court of sessions was a court of competent jurisdiction, and an independent foreign tribunal, though subject to an appeal, like the court of chancery, to the House of Lords. If the court of chancery could in that way restrain proceedings in the court of sessions, the sessions might equally enjoin proceedings in chancery, and thus stop all proceedings in either court. Lord Eldon said, he never meant to go further with the injunction, than the property in England; and he, on motion, dissolved it *in toto*." *Ibid.* 411, 12. In a note to the remarks upon the case in New York, he states that the assumed jurisdiction was not afterwards sustained.

The case *Diggs & Keith* v. *Wolcott*, (4 Cranch R. 179,) referred to in the foregoing extract, was this. Diggs & Keith commenced a suit in a county court in Connecticut, against Wolcott, on two notes. Wolcott filed a bill in chancery, in the superior court of the state, against them, praying that they might be compelled to give up the notes, and be perpetually enjoined from proceeding at law. This suit was removed by them into the circuit court of the United States, where it was decreed that they should deliver up the notes, and be enjoined, &c. The supreme court of

the United States, "being of opinion that a circuit court of the United States had not jurisdiction to enjoin proceedings in a state court, reversed the decree."

In *Ex parte Cabrera*, it was held, that "the jurisdiction of the courts of the United States is limited; and the inferior courts can exercise it only in cases in which it is conferred by an act of congress." And that "the circuit court cannot quash proceedings against a public minister, depending in a state court: nor can the court in any way interfere with the jurisdiction of the courts of a state." (1 Wash. C. C. Rep. 232.) "It is one thing," says Mr. Justice Washington, "to declare the process void; but another to define the tribunal which is to decide. The natural tribunal is that where the process is depending, or which has the superintending control over such courts." "I apprehend that neither court," federal circuit, or the state court, "can dictate to the other the conduct it shall pursue, or interfere in causes there depending, unless properly brought before it, under the provisions of law." *Ibid.* 236. "I am not one of those who think it a commendable quality in a judge, to enlarge, by construction, the sphere of his jurisdiction; that of the federal courts is of a limited nature, and cannot be extended beyond the grant." *Ibid.* 237.

"Where N. R. commenced suits at law in the superior court of the city of New York, against H. R., and H. R. filed a bill in chancery, to obtain an injunction restraining the proceedings at law, it was held that the suit in chancery could not be removed into the circuit court of the United States, inasmuch as such a removal would leave H. R. without remedy; the circuit court of the United States having no power to restrain the proceedings at law." *Rogers* v. *Rogers*, (1 Paige, 183.) Mr. Chancellor Walworth said, "In this case, the foundation of the suit is the inequitable prosecution of the suits at law against the complainants in the state court; and the relief sought is a perpetual injunction to stay those proceedings. By the commencement of the suits at law, the state courts have gained jurisdiction over the subject matter thereof, and the courts of the United States have no jurisdiction to restrain the petitioners from proceeding therein, or to decree a perpetual injunction, so as to prevent them from collecting the judgments which may be obtained in those suits. The effect of a removal of this cause, therefore, would be to leave the complainants without remedy." *Ibid.* 184.

It appears from this investigation, not only that the right to issue injunctions, restraining suits in the state courts, is not to be found, in express terms, in the general acts prescribing the course of

judicial proceedings in the courts of the United States, but that, lest the general terms, in which one clause of the judiciary act is expressed, might be supposed to assert or confer such a power, the courts and judges of the United States are under prohibition, by general law, not to issue such process.

If the power exist, therefore, in the cases in which it has been exercised, and in which it is proposed to exert it still farther, it must be sought for in the provisions of the bankrupt act itself. If congress, by the enactments of 1793 and 1807, have clearly restrained the judges of the courts of the United States from exercising such power, in general terms, to what provision of the bankrupt act are we to look for a repeal of those laws, or to a grant of the power, so far as the administration of that jurisdiction is concerned.

On examining the bankrupt law, it is found to contain no provisions authorizing, in terms, the issuing of an injunction. It provides that the jurisdiction shall be exercised summarily, in the nature of summary proceedings in equity; that the jurisdiction "shall extend to all cases and controversies in bankruptcy, arising between the bankrupt and any creditor or creditors who shall claim any debt or demand under the bankruptcy; to all cases and controversies between such creditor or creditors and the assignee of the estate, whether in office or removed: to all cases and controversies between such assignee and the bankrupt, and to all acts, matters, and things to be done under and in virtue of the bankruptcy, until the final distribution and settlement of the estate of the bankrupt, and the close of the proceedings in bankruptcy. And the said courts shall have full authority and jurisdiction to compel obedience to all orders and decrees passed by them in bankruptcy, by process of contempt and other remedial process, to the same extent the circuit courts may now do in any suit pending therein in equity."

It may be taken for granted, however, that the district courts were, by force of the act, authorized to issue such process as might be necessary to carry the act into effect, in the ordinary mode of exercising a jurisdiction of that character, so far as they were not restrained by some express enactment. This would be but an incident to the jurisdiction.

But the question arises, whether the passage of the law, conferring upon the district court jurisdiction in bankruptcy, operated of itself as a repeal of the clause of the act of 1807, by which the district judge, in issuing injunctions, is placed under the same rules, regulations, and restrictions as the judges of the supreme court of

the United States, and by which he is restrained generally from issuing injunctions to stay proceedings in the state courts. It is very clear, that the operation of that prohibition was not confined to cases where the jurisdiction of the district court existed before its passage. If, by a subsequent statute, the jurisdiction of that court was extended to some matter, beyond what before existed, that jurisdiction must be exercised like the previous jurisdiction, and under the same limitations and restrictions, unless there was some express extension of the mode of action in relation to that particular jurisdiction, or unless some necessarily resulted from the nature of the case.

The bankrupt law is but a law of congress, and containing no express repeal of the restriction of 1807, nor any express authority to interfere with the action of the state courts, the authority so to do, if any exists, must result from the nature of the proceedings, and the necessity of the case. It will hardly be disputed that such a necessity, in order to justify proceedings otherwise expressly prohibited, must be a clear, convincing, imperious, necessity; and the right founded on it must be bounded, and limited, strictly, to the limits of the necessity.

The authority of congress, to pass a bankrupt law, is not denied. Nor shall we deny, that having passed one, if it can only be carried into execution by writs of injunction, operating upon suits in the state courts, then the district courts have the power to issue them, and the restriction is repealed, so far as is necessary to effect the purpose; but this can only be because this course is necessary. It is limited to the cases in which it is necessary, and it ceases when the necessity ceases. No considerations of convenience are admissible for a moment. A man has no way of necessity over the land of his neighbor, because it is a shorter course, and more convenient, than the highway the laws have provided for him.

Has there been a necessity for issuing process of this character? Could not the jurisdiction under the act have been exercised, like the other jurisdiction of those courts, without interference with proceedings in the state courts?

In *Ex parte Foster* the learned judge says if he entertained any doubt of the right of the district court to issue injunctions, he "should not entertain any doubt as to the jurisdiction of the circuit court upon a bill, filed by the assignee, after his appointment, to overhaul and control or set aside all the proceedings" [in the state court,] "had in the intermediate time, by the attaching creditor, against the rights of the other creditors, and in subversion of the policy and objects of the bankrupt act." (5 Law Reporter, 73.)

Surely, the right to issue an injunction cannot be maintained from the necessity of the case, if the circuit court might thus *overhaul, and control, or set aside*, the proceedings and judgments of the state courts. But the right to do this must probably seek its foundation in some necessity quite as stringent as that required to justify an injunction. It can hardly find a basis in the policy of the act.

If the bankrupt act can be administered in Vermont, not only without any such proceedings, but with the full admission that the state courts have the right to render such judgments, and cause a sale of the property on the execution, it will be a most astonishing kind of necessity which shall drive the United States courts to attempt to impede the execution of final process here in similar cases.

But upon this branch of the subject, without entering into the inquiry what other mode might have been adopted, it is quite sufficient to say, that if the true construction of the bankrupt act is, that an attachment is not a security saved from the operation of the act, but the third section transfers the property to the assignee subject to no incumbrance, we see no reason why he might not demand and recover it, forthwith, without regard to the further prosecution of the suit. His right could not, in such case, be dependent upon the discharge, and the attachment must of necessity be dissolved. If this is so, it is very clear that there has not only been no necessity for injunctions upon creditors pursuing their remedy in the state courts, but that the practice of issuing them has been idle, or worse than idle.

And if the decree of bankruptcy does not vacate the attachment, then we say, further, it is because the property passes to the assignee subject to the incumbrance of the attachment — it is a security upon property, saved to the creditor — and, admitting this, an injunction, restraining him from availing himself of his security, thus saved, is a most unwarrantable interference with his rights, from whatever court it may issue. The doctrine, found in *Ex parte Foster*, that assuming an attachment on mesne process to be a security within the saving of the proviso, the attaching creditor ought, notwithstanding, to be restrained from prosecuting his suit, because, if permitted to prosecute it, he would secure to himself what the act saved to him, and because if restrained from proceeding until the debtor obtained his discharge, that discharge might then be used to deprive him of what the act saved to him, cannot stand for a moment in any court, unless it be one which finds a policy in the act, contrary to the admitted and declared will of the legislature which made the enactment. If the discharge, when

obtained, could be used to defeat and destroy the security which the act saved, the wrong done to the creditor would only be the more aggravated. How the attempt of a creditor, even by a race of diligence, to secure to himself a right which the law of the state conferred upon him, and the bankrupt act saved to him, or a judgment obtained by such a race of diligence, could be treated as a fraud upon the act which saved the right, or be deemed an overreaching and defeating of the just rights of the other creditors, has certainly yet never been satisfactorily explained.

"There is no power," says Mr. Justice Baldwin, "the exercise of which is more delicate, which requires greater caution, deliberation, and sound discretion, or more dangerous in a doubtful case, than the issuing an injunction; it is the strong arm of equity, that never ought to be extended unless to cases of great injury, where courts of law cannot afford an adequate or commensurate remedy in damages. The right must be clear, the injury impending or threatened, so as to be averted only by the protective preventing process of injunction: but that will not be awarded in doubtful cases, or new ones, not coming within well established principles; for if it issues erroneously, an irreparable injury is inflicted, for which there can be no redress, it being the act of a court, not of the party who prays for it. It will be refused till the court are satisfied that the case before them is of a right about to be destroyed, irreparably injured, or great and lasting injury about to be done by an illegal act; in such a case, the court owes it to its suitors and its own principles, to administer the only remedy which the law allows to prevent the commission of such act." *Bonaparte* v. *The Camden and Amboy Rail Road Company*, 1 Baldwin's R. 217.

Waiving any further consideration of the general question, whether any injunction could lawfully issue, and conceding, for the sake of the argument, that the district courts might, by virtue of their jurisdiction under the bankrupt act, and from the necessity of the case, restrain proceedings in the state courts until the bankrupt could obtain and plead his discharge, there is no necessity for the exercise of such a power after that time, nor can it with any propriety be issued to restrain the execution of a judgment of the court of a state, which, if erroneous, may be corrected by a writ of error.

If there are rights of property dependent upon the termination of the suit, and in which the assignee has an interest in behalf of the creditors, he may, as we have seen, become a party to the suit, and after the certificate is obtained, vindicate all the rights of which

he is guardian, by a regular proceeding, in due course of law, without a resort to any such summary interference. We see no reason to doubt that he may plead the discharge in the name of the bankrupt, should the latter refuse to do it himself, by virtue of the provision authorizing the assignee to become a party to the suit. It is so held in *Ex parte Foster*, (5 Law Rep. 72.) And if he might do this, he could sustain a writ of error, if the decision on the plea should be erroneous.

On the supposition, then, that there has been a time when the courts of the United States had power to issue an injunction, from the necessity of the case, that necessity has ceased, and the power has ceased with it. The injunction has been issued, and has done its office. This is apparent from the fact that the discharge is brought in and pleaded. The defendant, by pleading to the merits, waives any further benefit from the injunction to stay proceedings, unless the district court, by means of it, has taken him into its guardianship. Having put in his plea, he is entitled to require a replication. It cannot be necessary for the plaintiff to ask leave of the district court, or any other court, before he can answer the plea thus put in. When the defendant proceeds again with the cause, the plaintiff may do so as a matter of course.

There is no principle, or pretence of a principle, of which we are aware, on which we can admit the right of the circuit or district courts, in any manner, to interfere and stop the execution of the final process of the courts of this state. It is an assumption of power, that cannot be tolerated for a single instant. Even if the judgments might be regarded as nullities, that is not an admissible remedy; but we do not rely on that. So long as our judgments stand unreversed, the plaintiffs will be entitled to receive the fruits of them, by an appropriation of the property attached, and held as a security.

If the attachment has been dissolved, the assignee has his remedy by a writ of error. After a plea of discharge in bankruptcy — a replication setting forth an attachment — and a special judgment to be satisfied by a levy upon the property attached, it is very questionable whether he has any other remedy; especially if he has actually become a party to the suit.

Upon the service of the writ, by the attachment of the property, the sheriff became bound to hold it for the benefit of plaintiffs in case they should obtain judgment. The petition in bankruptcy neither ended the suit, nor dissolved the attachment. Nor did the decree of bankruptcy, or the certificate of discharge, in our opinion, operate, *ipso facto*, to produce such a result. And this seems to be fully

admitted in the opinion in the case of *Bellows & Peck*. The dissolution of the attachment is to be worked out only by the discharge of the debt, and the defeat of the action; and that is to be defeated, if at all, not by the injunctions from the district court, but by pleading the certificate. Such is believed to be the uniform course under the English bankrupt law.

If the certificate does not have that operation, then, the property being in the custody of the law, to await the termination of the suit, the sheriff is bound to apply it to the satisfaction of any judgment which may be rendered in favor of the plaintiff. If the judgment is erroneous, he may justify under it, against any one who is party, or privy, to it. *Bank of the United States* v. *Bank of Washington*, 6 Peters R. 16. Entertaining the opinions we do, we must hold him to this responsibility; and while we hold him thus liable, we are bound to protect him in the possession of the property, and in the application of the avails of it, against any such summary process.

We have faith to believe, that the learned judge of the district court will not assume such a control over our dockets, as farther to enjoin the plaintiffs, in actions pending here, from proceeding in such manner as the courts of the state may allow; or such a control over final process here, as to attempt to stop its execution.

If our opinions respecting his authority are correct, a resort to coercive measures, to enforce an injunction, or to punish a disregard of it, might possibly not be entirely safe, for those at least who should attempt to execute the order; but this is a matter upon which we shall not enter.

Should our faith on this subject prove unfounded, our course is clear.

If this court is, in these cases, to be "taught what the United States is," it must be by the regular action of the supreme court of the Union, upon the judgments of the courts of the state, through the operation of a writ of error, which it is admitted well lies, and not through applications to the district or circuit court, invoking the exercise of powers which can have no foundation but a necessity of a very questionable character, at the best, for their exercise; and which are appealed to in cases where the necessity, clearly, does not exist.

In thus freely and distinctly expressing our opinions, we trust that we shall escape the imputation of any discourtesy towards the tribunals of the Union, for which, it need hardly be said, we entertain the highest respect. The occasion must furnish a justification, for the freedom it has required. We cannot forbear to express

our convictions upon these matters, however deeply we may regret the difference of opinion which they indicate. We cannot be expected to yield a great principle, regarding the faith, credit and effect due to the judgments of the courts of the several states, to any feelings of judicial courtesy, however strong. We are not at liberty, and we may say without offence, that we have no desire, to lay the rights, and powers, and duties of the judiciary of this state, at the feet of the tribunals of this district and circuit, however great may be our respect for the incumbents. We have quite as little discretion in this respect, as the circuit court has to refuse jurisdiction, in a case where it has concurrent jurisdiction with a state court, and a suit upon the subject matter is already pending in the latter. See *Wadleigh* v. *Veazie*, (3 Sumner's R. 165.)

We disclaim any assumption of power to interfere with any rightful exercise of jurisdiction by the courts of the United States. But we as distinctly claim the right to take such measures as may be necessary to vindicate our own jurisdiction; and to execute our own process in cases where we have jurisdiction, so long as our judgments stand unreversed. We sincerely deprecate all collision with those tribunals; and to prevent misapprehension, and guard, as far as may be in our power, against any danger of interference, we take occasion to say, in conclusion, that if the plaintiffs in this and other cases similarly situated, shall ask the interference of this court, it will be our duty to enjoin and prohibit the bankrupt, and his assignee, the creditors, and all claimants of the property attached, from attempting to procure any process, from any court which is not acting under the authority of this state, with a view to prevent the entry of judgments in such suits, or to prevent the execution of the final process issued upon the judgments when obtained; and from applying for, or attempting to execute any summary process, order, or decree of any court, with the view and purpose of taking from the creditors, or their attorneys, the fruits of such judgments as they may obtain, on account of any supposed want of right in the court to render those judgments, or any supposed invalidity of such judgments, so long as they shall remain in full force and unreversed. And it will further be our duty, on application, to enjoin and prohibit all persons from making any application, or instituting any proceedings, founded on any supposed breach of an injunction, order, or decree, issued by any tribunal not acting under the authority of this state, by reason of any proceedings in the courts of this state, arising after the bankrupt has pleaded his discharge. And if any such injunction issued by us in any case, it will be our duty to punish any

infraction of it when brought to our notice, by prompt action, and by all the modes in which such orders are usually enforced.

We shall certainly regard our own judgments, rendered in cases in which we have a clear jurisdiction over the cause and the parties, as valid, and binding, until they are regularly reversed or annulled by some competent authority; and we shall execute those judgments, and protect the officers of the state in their execution, by all the means which the state has placed in our hands for that purpose.

Supreme Court, New York, May Term, 1844.

MARY CONRAD *v.* JOSIAH B. WILLIAMS.

It seems that an action cannot be maintained for the breach of a conditional promise to marry — as that the defendant would marry the plaintiff, if he ever married any one. Such a promise is in effect an engagement in restraint of marriage.

Under the circumstances of this case, it was held, that an absolute promise to marry had not been made out by the proof, and the verdict was set aside.

The credit to be given to a witness on the stand, is a question for the jury; and although the judge may lay down certain rules or principles, for their guidance in passing upon the credibility, it cannot often be proper for him to tell the jury, that they are not at liberty to believe a witness.

THIS was an action of assumpsit on a promise to marry, tried before Morrel, circuit judge, at the Tompkins circuit, in February, 1843. The plaintiff counted upon promises to marry, upon promises to marry on request — to marry within a reasonable time — to marry when defendant's health should be sufficiently restored, and to marry generally. Both parties resided in the village of Ithaca, the plaintiff with her mother, who was a widow. Their acquaintance commenced in the spring of 1839, and the defendant married another lady on the 7th September, 1842. The defence was, that there never had been a promise of marriage, or if any, not an unconditional promise. The only witness to prove a promise, was Frances Conrad, a sister of the plaintiff, who testified to five several conversations which she overheard between the parties, when they were in the parlor, and the witness was in an adjoining apartment, listening to hear what was said without their knowledge. The first conversation was in the spring of 1840;

the second in September or October of that year. The third late in the fall of the same year, or the beginning of the winter following. The fourth in the same winter, and the last in October, 1841. In these three years and upwards, which elapsed between the commencement of the acquaintance, and the defendant's marriage, the witness spoke of his having been at the house on several occasions. On the cross examination, she said she could not enumerate the number of times, but she was positive it was more than a dozen. The first particular visit was in November, 1839; the last was in November, 1841, when the defendant walked home with the plaintiff from a bethel meeting. The defendant was again in the house at a party, in December following, but stayed only a short time. He paid no further attentions, and was not again at the house until he was sent for when about to be married. In December, 1841, the witness first heard a report of the defendant's attention to the lady he afterwards married. In August, 1842, about a fortnight before the marriage, the plaintiff heard of the intended marriage in a way that she gave credit to the report, and was immediately taken with spasms, such as the attending physicians had never before seen or heard of. This was on Saturday; on the Monday following, the defendant was sent for, and visited the plaintiff. The defendant's brother was also sent for, and had a conversation with the family.

The plaintiff proved, by another witness, that the defendant walked with her most of the evening, at a party, in the spring of 1839, but he walked a part of the evening with another lady; also that the defendant walked with the plaintiff from the bethel school, one rainy day; the defendant was the superintendent, and the plaintiff a teacher in the school. On one occasion, when the defendant was riding in his sleigh with several ladies, he overtook the plaintiff, and asked her to ride, and she did so. The witness did not recollect seeing the parties together at any other time. This was the only evidence of any intimacy between the parties, save what was sworn to by Frances Conrad. Evidence was given by the defendant, and after the judge had charged the jury, the defendant's counsel requested the judge to charge, that if they believed, from the evidence, that there was no other promise made by the defendant, than *that if he married any one* he would marry the plaintiff, then the action could not be sustained. The judge remarked to the jury, that such was the law, and he had so intended to charge them. The jury found a verdict for the plaintiff, for eight thousand dollars.

The defendant moves for a new trial on a case. A motion was

also made at a special term, to set aside the verdict on the ground of irregularity on the trial, which motion was held under advisement.

Other affidavits, on both sides, were read on the argument of the case.

B. Johnson and *J. A. Spencer*, for the defendant.

M. T. Reynolds, for the plaintiff.

Bronson J. If the principal witness must be understood as swearing to an unconditional promise of marriage, there is nothing in the case which tends, in the slightest degree, to corroborate her testimony. So far as appears, no one else had ever known or heard of any intimacy between the parties, or that the defendant had ever paid any marked attention to the plaintiff. No one but the sister, not even the other members of the family, nor any of the family connections, seem to have either known or suspected that there was any engagement of any kind between the parties. The attempt which the plaintiff made to show facts from which a promise might be inferred, or which would tend to confirm the direct evidence of a promise, wholly failed. It is unusual, to say the least, that an engagement of this kind should exist for nearly two years and a half, between persons residing in the same country village, without any manifestation of partiality on the part of the gentleman, as to induce a suspicion among their neighbors or friends that a marriage was in contemplation. In addition to this, the notes which were written by the plaintiff to the defendant, and the non-production of his answers, if any were given, furnish reasons for the belief, that the anxious and tender feelings which were manifested by the lady, were not reciprocated by the gentleman; and these, with several other facts which appear in the case, tend strongly to the conclusion that neither of the parties supposed there was any engagement between them.

Still the credibility of the principal witness was a question for the jury, and although she did not hear the conversations of which she speaks under the most favorable circumstances for arriving at an accurate knowledge of how much was intended by the parties; and although she had made memoranda, and recited the conversations in a way which induced a suspicion on the part of the counsel that her story had been prepared for the occasion, it still belonged to the jury to say with how many grains of allowance her testimony should be received. The defendant's counsel asked too much, therefore, when they requested the judge to tell the jury that her testimony was to be wholly disregarded.

It is sometimes proper, and it would have been well enough in this case, for the judge to lay down certain rules or principles for the guidance of the jury in passing upon the credibility of a witness. But the counsel made no such request, and it cannot often be proper for the judge to tell the jury that they are not at liberty to believe a witness. The second letter, written by the plaintiff's brother, Vincent Conrad, can only be regarded as the act of a third person, for which the plaintiff is not responsible. There is no evidence that she approved or ever knew that such a letter had been written. It is said that the letter should have been received by way of impeaching the testimony which had been given by the writer. But I do not see that it could amount to an impeachment. The letter was written after the defendant's marriage, and it speaks of a *conditional* promise to marry her *if he ever married at all.* But the writer had said nothing in his testimony about an *unconditional promise;* indeed, no such thing seems to have been thought of by any one until about the time the suit was commenced. I do not see that there was any error in rejecting this evidence. No question appears to have been made on the trial concerning the comments of counsel upon No. 13 of the plaintiff's notes to the defendant, and it is now too late to take the objection.

It is next said that the verdict is against evidence; that there was no proof of an unconditional promise of marriage. It has already been remarked that there is nothing from which a promise of any kind can be inferred. The case turns wholly upon the direct evidence of a promise given by a single witness, without the aid of any collateral fact to support her testimony; many of the collateral facts tend to the conclusion that there was no engagement of any kind between the parties. But the jury have passed upon the credibility of the witness, and I shall assume that she has related truly what she overheard while listening to the conversation of the parties. She does not pretend to have heard all or any considerable portion of what passed in either of the conversations, and it is quite possible that she heard the parties speak of marriage, when, if we had the whole conversation it would be evident that neither of them had any settled purpose of contracting that relation. But if nothing had been said beyond what the witness has related, I do not see how it would be possible to uphold the verdict. I do not intend to say that there was no evidence which would warrant the jury in finding a promise of some kind; but only that there was no sufficient ground for finding any of the promises upon which the plaintiff has counted.

Without detailing the conversations particularly, it will be suffi-

cient to say that they were of an unequivocal character; and to show how they were understood by the witness, and by the plaintiff herself. The last conversation was in October, 1841, when the defendant, among other things said, "*there is no certainty about my getting married, but I wont say I never will.*" She said, "Mr. Williams, shall I still consider myself engaged to you, *if you ever do get married?*" He said, "Yes." After the plaintiff was taken with the strange spasms, about a fortnight before the marriage, the defendant was sent for, and went to the house, where he had not been for the last nine months, except that he had called there a short time one evening, eight months before, at a party. The sister testifies that when the defendant went to the bed, the plaintiff said, "Mr. Williams, did not you tell me you would marry me, when you married any one?" He said, "he did, but it was only to calm her feelings." She said, "I know you told me so, but I did not know what you told me so for." On the cross-examination the witness gave the conversation in this way. Mary said, "Did you not tell me *if you married* any one you would marry me?" He said, "he had." The family then sent for the defendant's brother Timothy, and the sister testified that she told him the defendant had said, he would *marry Mary whenever he got married.*

Timothy S. Williams testified, "that when sent for he went, and had a conversation with the plaintiff and her sister Frances. Mary stated that my brother had not done with her as he agreed. She said he had told her *he never intended to marry anybody;* that when she told him he would perhaps change his mind, he told her he would let her know if he did, she said, he added still further, that *if he ever married*, he would come and take her. I think these were the words or very near the words. *Fanny was present and asserted the same thing, and said she had heard him say so.* She said he told Mary *if he ever got married*, he would come and take her. *That he said he never intended to marry any one, that she could not depend on him.* I understood both Fanny and Mary to say so; no other promise was mentioned as I recollect." The witness called again the next day, when Fanny and Mary both reiterated what was said the evening before. Four or five days afterwards, and after the plaintiff's brother, Vincent, had had ample time to inform himself of whatever the family knew or felt on the subject, he wrote the defendant a letter, bearing date the 5th day of September, 1842, two days before the marriage, which he testified was written "with an understanding with Mary." In this letter the brother said, "This communication is made partly by request of sister Mary, and partly on my own account, to inform you what

we shall require of you in order to the friendly arrangement of the unfortunate affair now existing between us. My sister directs me to say that she will require you to *fulfil the solemn engagement made with her, which was substantially this, that if you ever married, you would marry her.* This engagement, if faithfully kept on your part, *although it does not bind you to marry*, will nevertheless *compel you to abandon entirely your intended marriage with another*, which you have acknowledged is soon to take place. *This*, my sister as well as myself, *insist upon your doing*, and it is all that she at present requires." Then followed a requirement that the defendant should make an apology to the brother, with a threat in case the defendant refused to comply with these terms. The defendant answered the letter, but the plaintiff did not produce the answer.

Whatever inference might be drawn from any or all of the five conversations which were overheard by Frances, if they stood unexplained, both the plaintiff and her witness, and I may add the whole family, so far as they profess to know anything about the matter, are fully committed in relation to the nature and extent of the alleged promise. They have told us how the conversations were understood by them; and this has been done on occasions and under circumstances when they were disposed to make the very worst case they could against the defendant. Taking their own account of the matter, there never was an unconditional promise to marry the plaintiff; at the most the promise was not to marry any one else, or to marry the plaintiff if he married any one. This was the charge brought against the defendant, when he was sent for; and it was repeated to his brother on the two following days, and after the family had taken further time for deliberation, the accusation was set forth in a formal written document, which was the joint act of the plaintiff and her brother, and contained the terms on which the matter might be arranged. There was no pretence of anything more than a conditional engagement, and it was expressly admitted that it was such an one as did not bind the defendant to marry the plaintiff. But it was said that it would compel the defendant to relinquish the purpose of marrying another lady, and this was all that the plaintiff required. Now upon such a state of facts as we have here, the jury was not at liberty to find an unconditional promise.

There are other facts in the case which strongly tend to the conclusion that injustice has been done to the defendant, but this is enough. We do not very often disturb the verdict of a jury, on the ground that it is against evidence, but if it should not be done

in a case like this, there is reason to fear that trial by jury would soon cease to be a blessing, and fall into discredit with the people.

It has not been contended that an action would lie upon such a promise as has been mentioned. It was in effect a promise in restraint of marriage. But it is enough to say that the plaintiff has not counted upon any such promise as that which was proved.

Although the verdict must be set aside without any reference to the facts disclosed by the affidavits, I am glad that the affidavits have been laid before us, because they have relieved my mind from the apprehension that the jury had been carried away by prejudice, partiality, or passion. It appears from the case, that at the close of the charge, the judge was requested by the defendant's counsel to instruct the jury that the action could not be sustained on such a conditional promise as had been mentioned, and the judge told the jury that such was the law. Every one of the jurors has made an affidavit, that although he noticed that something passed between the counsel and the judge at the close of the charge, yet that owing to the great noise and confusion which then prevailed in the house, he did not hear what was said either by the counsel or the judge. This explains how it happened that the jury found a verdict which was not warranted by the evidence before them.

I must not dismiss this case without a further remark upon what appears in the affidavits; although there is a conflict in the statements upon some points, it is impossible to read the affidavits without the painful apprehension that popular feeling was brought to bear upon the administration of justice. Some portion of the applause which a part of the audience bestowed upon the plaintiff's counsel was probably intended for the jury, and there was a want of that order and decorum which should always prevail in courts of justice. It is not to be tolerated that men should go into such a place and manifest their feelings, prejudices or passions, for the purpose of exerting an influence upon those who sit in judgment upon the rights of parties. Although some of the witnesses say that there was not much disturbance in the house, we have the remarkable fact proved beyond the possibility of contradiction, that in consequence of the noise and confusion which prevailed, not one word of the most important part of the charge was heard by a single juror; I call it the most important part of the charge, for the reason that if the jurors had heard it, they could not have found the verdict that was rendered.

There were collateral facts in the case which were calculated to awaken sympathy for the plaintiff and excite prejudices against the

defendant. In such a case more than usual pains should be taken to guard the jury against being carried away from the main points of the controversy. But I will not pursue the subject. What would be our duty if the case stood wholly upon the affidavits, need not be considered; for whether we open them or not, it is clear that there must be a new trial. But as there was no error in the ruling of the judge upon any point of law, it must be upon payment of costs.

Ordered accordingly.

Circuit Court of the United States, for the District of Ohio, Cincinnati, July Term, 1844.

DUNDAS AND OTHERS *v.* BOWLER AND OTHERS.

An assignment of a note is a new contract, and is governed by a law of the place where it is made.

The supreme court of Pennsylvania having decided that the assignment made by the late Bank of the United States to trustees for certain purposes, was valid, this court will so consider it.

The power of the bank to make the assignment depended on the construction of a statute of that state.

The indorsement of a negotiable note in different states, by different indorsers, will be governed, on the dishonor of the bill, by the local law, where each indorsement was made.

The law of Ohio, which declares that an assignment by a debtor, in failing circumstances, to a part of his creditors, in preference to others, shall be for the benefit of all creditors, can have no effect on an assignment made in another state of an instrument executed in Ohio.

The act of 1824, which declared, that the true construction of the above act was and is to apply to all assignments, so as to compel the assignee to receive the notes of the bank in payment, as regards prior contracts, is unconstitutional and void.

On subsequent contracts it can have a constitutional operation.

The effects of this law on future contracts is, to restrain the negotiability of notes given to banks, by declaring that the equities, as between the original parties, shall remain open in the hands of the assignee. [*Western Law Journal*, p. 27.]

Digest of American Cases.

Selections from 12 Ohio Reports.

ACTION.

Where four persons executed a bond at the same time, which took effect by a single delivery, three of them describing themselves as securities for the fourth, they may be sued as joint obligors, in the same action. *Stage* v. *Olds and others*, 158.

2. The detention, arrest, and conviction of a felon, or the discovery and return of stolen money, is, in general, a good consideration to sustain a promise of reward. *Gilman* v. *Lewis*, 281.

3. When the condition is complied with, he who performs it becomes the promissee, the legal interest becomes vested in him, and he has a right to claim the reward. *Ibid.*

4. An express written promise to one partner, may be sued on by him alone. *Moore* v. *Gano and Thoms*, 300.

5. Where one who is a member of two firms, makes a promissory note in the name of one firm, payable to a person who is a member of the other firm, the payee may sue and recover upon it at law. *Ibid.*

ASSIGNMENT.

When a creditor, with design to secure a preference for himself, receives, as trustee, as assignment of property from a debtor, in failing circumstances, and contemplating insolvency, he will be held to account for the property, although he may have divested himself of it, after other creditors have filed a bill under the statute to charge him as trustee. *Mitchell* v. *Gazzam and others*, 315.

BANKS AND BANKING.

A foreign bank may maintain a joint action against the drawer and indorser of a bill of exchange. *Lewis* v. *Bank of Kentucky*, 132.

2. In such action, the plaintiff may declare, on the common count, for money lent and advanced, and under it recover protest damages. *Ibid.*

3. The declaration need not aver protest. *Ibid.*

4. In a suit brought by a foreign bank, its corporate character is put in question by the plea of the general issue, and must be proved under that plea; but a special averment of its incorporation is not required. *Ibid.*

5. In a suit by a bank, incoporated under the laws of this state, the court will take judicial notice of its corporate capacity. *Ibid.*

6. The provisions of the act of March, 1842, requiring the sheriff to receive, in satisfaction of an execution in favor of a bank, the bills and notes of the bank are constitutional. *Bank of Gallipolis* v. *Domigan*, 220.

7. The sheriff's return, showing, on its face, a compliance with the provisions of that act, is conclusive on motion to amerce. *Ibid.*

8. If the plaintiff would controvert the facts stated in, and justifying the return, it can only be done in an action for false return. *Ibid.*

9. An agreement between a bank and contractors on the public works, for the bank to make a loan to the state, and charge the contractors five per centum commission, is an illegal shift and devise by the bank to obtain more than six per centum upon its loans. *Spaulding* v. *Bank of Muskingum*, 544.

10. Such a contract would not be enforced in favor of the bank against the contractors. *Ibid.*

11. But the contractors are in *pari delicto*, and having paid the commissions, cannot recover them back. *Ibid.*

BOUNDARIES.

When an entry calls for one thousand acres, on the lower side of Brush Creek, "beginning at a marked cherry tree, supposed about ten miles above Todd's road, running thence west 400 poles, and from each end of this line for quantity," the distance is to be understood to be in a direct line, and not by the meanders of the creek, it being a small stream, and the usual line of travel not upon its banks. *Buckley and others* v. *Gilmore and Hopkins*, 63.

2. If the marked tree be notorious, so as to be easily found by a surveyor, with reasonable diligence, the entry will not be invalid, although its distance exceeds that called for. *Ibid.*

3. The apparent intention of the locator is to be regarded; and if the lower side of a creek be called for, not as a boundary, but as designating the position of the starting corner, lands on both sides of the creek may be included, if they come within the descriptive boundaries. *Ibid.*

CHANCERY.

A will bequeathing an estate to A and his heirs forever, in trust, for B, a feme covert, for life, and to such uses as she, notwithstanding any coverture, shall appoint, and after her death, to the use of her heirs, is an equitable fee simple in the first *cestui que trust*. *Armstrong* v. *Zane's Heirs*, 287.

2. A court of chancery will decree a conveyance, by the trustee in fee, to a stranger, under the appointment of the *cestui que trust*. *Ibid.*

3. But costs will not be decreed against the trustee who refused to convey without the direction of the court. *Ibid.*

CONSIDERATION.

In every case the consideration of a note may be inquired into for the purpose of detecting illegal interest, and it will be disallowed, unless there has been a voluntary and full liquidation and payment of such interest between the parties. *Baggs* v. *Loudenback*, 153.

2. Inadequacy of consideration will not be presumed where both parties have dealt with an equal degree of knowledge and with their eyes open. *Galloway* v. *Barr*, 354.

CORPORATIONS.

Foreign corporations, suing in the courts of this state, must prove their corporate capacity, under the plea of the general issue. *Lewis* v. *The Bank of Kentucky*, 132.

2. The burden of proof lies upon such corporation, but a special averment of its corporate character is not required. *Ibid.*

3. The court will take judicial notice of corporations created by the laws of this state.

CRIMES AND CRIMINAL PROCEEDINGS.

To constitute the crime of murder in the first degree, when the purpose to maliciously kill, with premeditation and deliberation, is formed, the length of time between the design so formed and its execution is immaterial. *Shoemaker* v. *The State*, 43.

2. It is good cause of challenge, in capital cases, that the jurors are not electors and householders; but it is not ground of error that they are not described as such in the record. *Ibid.*

3. It is an indictable offence, in public officers, to exact and receive anything more for the performance of their duty than the fees allowed by law. *Ibid.*

4. A promise to pay extra compensation is absolutely void. *Ibid.*

5. A reward offered for the apprehension of a thief cannot be claimed by a constable who arrests the thief by virtue of a warrant delivered to him for that purpose. *Ibid.*

DEEDS.

Under our constitution, the legislature has not power to enact laws that shall pass the land of a married woman by an instrument not binding upon her at the time of its execution. *Good* v. *Zercher*, 364.

2. The curative acts to render valid the imperfect acknowledgments of deeds by married women are void. *Ibid.*

3. A certificate of acknowledgment to a deed by husband and wife, stating that the wife was examined "according to law," is insufficient to bar her of dower, after the husband's death. *Meddock* v. *Williams*, 377.

4. The certificate of acknowledgment must show, on its face, what acts were done, so the court may see that the statute was complied with. *Ibid.*

5. The certificate must show, either in express terms or by implication, a compliance with every substantial requisition of the statute. *Ibid.*

EXECUTION.

The freehold of an husband in his wife's land, may be sold on execution against the husband. *Canby* v. *Porter*, 79.

2. Where lands are valued for judicial sale, the annual crops are not included in the estimate. *Cassilly* v. *Rhodes*, 95.

3. The debtor's rights, therefore, can only be saved by regarding the annual crops as severalty, and requiring a separate levy. *Ibid.*

FORCIBLE ENTRY AND DETAINER.

A purchaser at a tax sale cannot obtain possession by proceeding under the act for forcible entry and detainer. *Kelley* v. *Hunter*, 216.

FORFEITURE.

Where a lease is forfeited for nonpayment of rent, the exact rent due by the terms of the lease must be demanded before sunset of the day when due, on the land, at the most notorious place. *Boyd* v. *Talbert*, 212.

INFANCY AND INFANTS.

Where purchase money becomes due in the lifetime of a vendee, the infancy of his heir will not excuse delay in making payment, so as to entitle the heir to specific performance, after a great lapse of time. *Henry* v. *Conn and others*, 193.

INSANITY.

On a question of insanity, witnesses, other than professional men, may state their opinion in connection with the facts on which it was founded. *Clark* v. *The State*, 483.

2. A physician should also state the reasons of his opinion, and the facts upon which it is based. If not sustained by them, it is of little weight. *Ibid.*

INSURANCE.

Where the assured has contracted to convey the assured premises at a future day, on payment of the purchase money, and between the date of the contract and the day of payment, the premises are destroyed by fire, this is not such an alienation as would defeat the policy. *Trumbull* v. *The Portage County Insurance Company*, 305.

2. The assured had an insurable interest and the legal title, and an equity equal to the purchase money or the whole value of the premises, and, being in possession, they may recover upon the policy. *Ibid.*

LIBEL.

When a publication is libellous of itself, an averment in the declaration of the plaintiff's official or professional character will not be ground of error, although the libellous matter does not apply to that official or professional character: as where the plaintiff averred himself to be an attorney and counsellor at law, and the charge was, that he had stolen an umbrella. *Gage* v. *Robinson*, 250.

2. Where the charge imputes a corrupt or dishonest intent, a plea of justification must show, not only the truth of the facts charged, but that they were accompanied with the imputed intent. *Ibid.*

LIMITATIONS, STATUTE OF.

The plea of the statute of limitations is a defence not to be favored. *Sheets* v. *Baldwin's Administrators*, 120.

2. After issue made up, or if he be in default, a defendant will not be allowed to put in that plea, unless under peculiar circumstances. *Ibid.*

3. Where, by the saving clause of the statute of limitations, the right to review a decree in chancery is saved to one of the parties against whom it was rendered, the saving inures to the benefit of all. *Massie's Heirs* v. *Matthews' Executors and Wallace*, 351.

MEDICAL JURISPRUDENCE.

On a trial for murder, where insanity was set up as a defence, a physician having stated, on examination in chief, that, in his opinion, the prisoner was insane, he may be asked, on cross examination, whether, in his opinion, the prisoner knew right from wrong; as, that it would be wrong to commit murder, rape, arson or burglary. *Clark* v. *The State*, 483.

Notices of New Books.

REPORT OF THE TRIAL OF THOMAS WILSON DORR, FOR TREASON AGAINST THE STATE OF RHODE ISLAND, CONTAINING THE ARGUMENTS OF COUNSEL AND THE CHARGE OF CHIEF JUSTICE DURFEE. By JOSEPH S. PITMAN, Attorney and Counsellor at Law. Boston: published by Tappan & Dennett, 114 Washington street. 1844. pp. 132.

Upon perusing the report of this important trial, we are more struck by the fidelity of the reporter than by any display of ability in the several parties concerned. The value of the case consists rather in the manifestation it affords, that in the midst of an excited popular feeling, and the turmoil of political passion, the wretched demagogue who threw a whole community into a paroxysm of fear, and who, when arraigned for trial insulted the counsel, the people, the court and government, nevertheless could receive a patient, an extraordinarily patient and impartial hearing, — than in the settlement of any important legal questions.

The difficulty of empanneling a jury amidst a community who so recently apprehended war and bloodshed, or more exactly murder and rapine, from the hands of the prisoner they were about to try, aided by a crew of reckless and lawless men, is apparent from the proceedings of the first five days of the session. Four of these were exclusively occupied in questions relating to the jurors. Six venires were ordered, one hundred and twenty-four jurymen were summoned, and the twenty peremptory challenges allowed were exhausted by the prisoner before the panel could be filled.

The most difficult question, at this stage of the proceedings, regarded the political character of the jurymen. The prisoner suggested to the sheriff, that he ought to return "one or two democrats," for which impropriety he was afterwards severely and deservedly rebuked by the court. It does not, however, appear, from anything in the trial, what was the political complexion of the jury; although, to some inflamed partisans, the conviction of the prisoner may be deemed sufficient proof that it was composed exclusively of "*Algerines*," no great compliment to the honesty or common sense of "the party;" for we undertake to say, that he who candidly reads the report of the trial would be very much surprised at the assertion, that any other than a verdict of guilty could have been rendered in the case, by men who regarded the obligations of conscience as paramount to the dictates of party.

How the jury should be constituted was, however, a question filled with difficulties. The attorney-general proposed, at the commencement of the proceedings, that two questions should be put to each juryman, tending directly to ascertain his individual opinion of the merits of the case, viz.: whether he voted for the Dorr constitution, and whether he believed him to have been the governor? The court very properly refused to allow these questions to be put, and only the inquiry usual in capital cases was permitted. Twelve men were at last found, who had formed no opinion upon the controversy. Wherever the word of the juryman was doubted on his *voir dire*, witnesses were called, to confirm or contradict him; and we repeat, that for aught that appears in the report before us, the panel was fairly constituted, without the remotest reference to political opinions. Undoubtedly, however, one of the main objects of the defence, proceeding, as it did, upon legal technicalities, and in desperate conviction that no substantial defence could be raised upon the facts, was to create political capital, to excite a partisan sympathy for the criminal, and to gain for him the reputation of a martyr.

The court seemed to feel this attempt, which in a political trial they must have known would be successful in a certain degree; for the chief justice remarks, in the opening of his charge, that they "find it necessary to guard against misrepresentation, not particularly against misrepresentation made to the people of this state, who know us, but against those which may be made to the people of the United States, and perhaps to posterity." Misrepresentations have recently been made, by reckless men, who to party sacrifice truth, and would bend to it in abject submission the ministers of justice; but that dignified and able court have the consolation of knowing, that the virtue and intelligence of the country uphold and applaud them.

We do not intend, nor have we the space, to discuss the questions raised at this trial. The facts were proved, not only by witnesses, but by the confession of the prisoner in open court. His speech to the jury, which the reporter courteously styles an argument, was a confession of his treason. "I resolved to possess myself of the arsenal, as that would have been a decisive step, and one which would have placed in the hands of my party the power of the state. The attack was made by my order. The army was put in motion about two o'clock in the morning of the 18th. The number of our forces was not over 250. The night was dark and foggy. The guns were drawn up and pointed at the arsenal. A body of men was detached, to lie in wait, to enter the arsenal when the door should be opened. I gave the order to attack, and to fire upon the building."

The facts thus conclusively proved, left little for the jury to do. It was not upon the facts, but upon the law, that the prisoner rested his hopes of acquittal, if he had any, and the points made in the defence were five in number, as stated by his counsel.

1. That in this country treason is an offence against the United States only, and cannot be committed against an individual state.

2. That the fourth section of the act of Rhode Island, of March, 1842, entitled, "an act relating to offences against the sovereign power of the state," is unconstitutional and void, as destructive of the common law right of trial by jury, which was a fundamental part of the English constitution at the declaration of independence, and has ever since been a fundamental law in Rhode Island.

3. That that act, if constitutional, gives this court no jurisdiction to try this indictment in the county of Newport, all the overt acts therein being charged as committed in the county of Providence.

4. That the defendant acted justifiably as governor of the state, under a valid constitution rightfully adopted, which he was sworn to support.

5. That the evidence does not support the charge of treasonable and criminal intent in the defendant.

The questions of law the prisoner's counsel proposed to argue to the jury, but the court would not allow them to do so.

Tolerably conclusive evidence, upon what a feeble foundation the prisoner rested his hopes of acquittal, may be derived from the foregoing statement of his points. If there could have been a serious doubt in the mind of any lawyer, whether or not treason could be committed against an individual state, that doubt will be readily removed by a perusal of the charge by chief justice Durfee. The question had, indeed, been decided in effect long before this trial. An argument upon that occasion would have been of little avail, if made to the court. To any other jury, perhaps, it might have afforded an excuse to some one of the panel to disregard his oath, and thus, though it certainly would not have produced an acquittal, might have prolonged the excitement, by causing a disagreement.

We have extended this notice beyond our intention, when we commenced it. We can only say, in conclusion, that every lover of freedom, every patriotic American, will rejoice at the result of the trial. When, after the termination of the present presidential contest, it shall be deemed no longer useful for Mr. Dorr to endure his punishment, it is probable that he will accept the offered terms of pardon, and, swearing allegiance to the new constitution, will sink into the insignificance from which it is unfortunate he ever emerged.

Intelligence and Miscellany.

Admission to the Bar. — In a former number, (ante, p. 208,) we alluded to the admission to the Maine bar of a young man under circumstances somewhat peculiar. At the last July term of the court of common pleas, in Boston, he applied for admission to the Suffolk bar, under that section in the Revised Statutes which provides, that any person who shall have been admitted an attorney or counsellor of the highest judicial court of any other state, of which he is an inhabitant, and shall afterwards become an inhabitant of this state, may be admitted to practise here, upon satisfactory evidence of his good moral character and his professional qualifications. The applicant exhibited his papers, from which it appeared that he had been examined by Thomas A. Deblois and Joseph Howard, Esquires, of Portland, and on their certificate he was admitted to practise in that state. Judge Allen, to whom the application was made, appointed Charles B. Goodrich and P. W. Chandler, Esquires, to examine as to his qualifications. Those gentlemen subsequently made a report to the court from which it appeared that the applicant formerly applied to the late Chief Justice Williams, of the court of common pleas, for admission to the bar upon examination, not having completed the required time of study in this commonwealth. Upon examination by that judge, he was rejected. He then applied for admission to Judge Allen, and was upon examination rejected. That judge was not aware that the applicant had been examined and rejected by the chief justice. Another application was made to the latter at the last January term, which was also unsuccessful. The applicant then removed to Maine, with the intention of residing there, and applied for admission to the bar, where he was admitted, as before stated. Upon these facts the examiners requested the opinion of the court as to whether the applicant was entitled to another examination. By the Revised Statutes, ch. 88, § 20, any person who has not passed the requisite time in the office of some attorney may petition to be examined for admission, and if the examination is satisfactory he shall be admitted in like manner as if he had studied three full years. Is a petitioner entitled to more than one examination? Then, if a person applies here and is rejected on examination, will an admission in another state before the expiration of three years, place him in any better condition than if he remained here? Judge Allen took time for consideration; but his resignation having taken effect before the next term of the court, the matter came before Chief Justice Wells, at the present term, who was of the opinion that the petitioner was entitled to an examination. Accordingly, Messrs. Ellis Gray Loring, William Gray, and N. C. Betton, Esquires, were appointed examiners (the former examiners having been excused on their request.) The result was two more examinations, and an opinion by a majority of the examiners that the petitioner was not qualified for admission.

We regard this case of interest and importance in more respects than one; so much so, that we should have been glad of a decision from the whole court. The old rule requiring a certain fixed period of study as a prerequisite to admission to the bar, was beyond all question highly beneficial to all concerned. We have always regarded the provision respecting examinations for admission to the bar as a sacrifice of principle to popularity, and it is highly

desirable that it should be construed strictly. And with some of the judges an examination is regarded as no joke. The chief justice of the supreme court, in particular, has been most faithful in this regard, and we suspect he is not often troubled by applications. Now, by the case before us, the inquiry arises as to *how many times* a person can be examined? May he apply to every judge in the commonwealth *seriatim?* Surely, a dignified tribunal owes it to itself to place some limit, and at least one judge of the old court of common pleas refused to examine a petitioner more than once in any event. Whether the admission in another state of an unsuccessful applicant here, can give him any more rights than he had before, we will not stop to discuss. It seems too plain for argument.

Codification — We have been much interested in a discussion upon codification in the Western Law Journal. The first article upon the subject, from the pen of the editor, was drawn up several years ago, but the writer declares that he still adheres to the doctrines therein maintained, and that he is a stronger advocate for codification now than he was then, in consequence of what has actually been accomplished in New York and Massachusetts. This is followed by a well-reasoned and able article on the other side of the question, by Mr. Van Hamm; and there are also several extracts from a recent speech of Lord Brougham, in favor of codification. We do not intend to enter upon a discussion of this matter at the present time, and merely throw out a suggestion for the consideration of our contemporary. Admitting that codification is practicable, and even desirable, in other countries, it seems to us to be a more difficult question, whether it is expedient to undertake it in our own. Who is to do the work? "No doubt," says Mr. Walker, "it would be a work of vast labor, requiring the highest order of intellect. It might task, for years, the highest powers of the Marshalls, the Websters, and the Storys of our land." It is not pretended, he continues, that ordinary legislators would be equal to such an undertaking; and he admits that commissioners must be appointed to prepare a code, and then "it would only remain for the legislature to add its formal sanction." Now this is precisely what is not likely to happen. Our experience of legislative assemblies leads us to doubt whether they will ever add a *formal* sanction to anything. No, however practicable and desirable it may be to frame a code, the fact should not, and cannot be lost sight of, that it is ultimately to be examined, discussed, pawed over by third rate lawyers and self-styled "practical men," many of whom are trying their legislative wings for the first time, and who are just as competent to make a world as they are to frame a complete code of laws. It is well known, that men of the highest eminence in our profession are seldom members of legislative assemblies in this country, and when they are, their influence is comparatively small. Nor will any one deny that codification must severely task the highest faculties of the ablest men in the profession; and these are precisely the men who will not pass upon any code in *the last instance*. They may prepare it, and send it forth as near perfection as it is possible for anything human to be; but how it will appear, when completed by the legislature, is quite a different affair. The truth is, the crying evil of our day is over legislation — hasty, ill-digested, rickety statutes; and the same assemblies who yearly send forth the spawn of their diseased imaginations and reformatory speculations, are those who are to make our codes if we ever have any. What good reason is there to suppose their codes will not partake of the same nervous symptoms of derangement, as their thousand yearly acts and resolves?

Lord Redesdale and Mr. Justice Buller. — We take the following notices of these distinguished judges, from the notes in the first volume of Mr. Sumner's edition of Vesey:

Mr. Mitford was the author of the valuable work on Equity Pleadings, and, under the title of Lord Redesdale, the distinguished chancellor of Ireland. He was born in London, in 1748; in 1792 he became solicitor-general, and in this capacity assisted in the state trials of 1794. In 1799, when Sir John Scott became chief justice of the com-

mon pleas, he succeeded to the post of attorney-general. On the retirement of Mr. Addington from the speaker's chair, he was chosen speaker of the house of commons. Considerably more than a century had passed since the election of any lawyer, who had filled the office of attorney-general. Sir Robert Sawyer, and Sir William Williams, in the days of Charles II., were the two last examples, both of whom Sir John Mitford was said to equal in ability, while he surpassed them in integrity. He held this high post from February 11th, 1801, to February 9th, 1802, when he was appointed chancellor of Ireland, with a peerage. From this place he was dismissed, in 1806, on the accession of the whigs to power. He continued to take an active part, particularly in the judicial labors of the house of lords, down to his death, January 16th, 1830, in his eighty-third year. The Reports of Schoales and Lefroy preserve in two valuable volumes some of his judgments in Ireland, which attest his learning and excellence as a judge. His juridical character, founded on his volume on Equity Pleadings, on his labors in an extensive practice in chancery, on his judgments in Ireland, and on his exertions for twenty-five years of unofficial life in the house of lords, is among the highest in the history of the English law. In moving the appointment of a new speaker, when Sir John Mitford had accepted the post of chancellor of Ireland, Sir William Grant, than whose praise none can be more weighty, said: "How he will fill that place can be no doubt with those, who know that in the whole compass of legal science there is nothing which his capacious mind has not embraced, from the minutest rules of forensic practice to the most enlarged principles of general jurisprudence." His name, at a later day, was pronounced from the bench with the homage of more than one distinguished magistrate. See *Cholmondeley* v. *Clinton*. (2 Jac. & W. 151); *Lloyd* v. *Johnes*, (9 Ves. 54; 12 Amer. Jurist, 54). In *Jennings* v. *Pearce*, (post, p. 447 of this volume,) Lord Thurlow inquired of him with regard to the practice of the court. See London Law Mag.

Mr. Justice Buller was born in 1746, and was appointed a justice of the king's bench in 1778, when only thirty-two years of age. His arguments at the bar, and his summings up of evidence, as a judge, were characterized as masterly, while his learned and able judgments are still admired in the reports. It is said that he was disappointed in not becoming the successor of Lord Mansfield, on the retirement of the latter, in 1788. He continued on the king's bench, by the side of Lord Kenyon, till 1794, when he retired to the court of common pleas. He remained a puisne judge of this court till his death, in 1800, at the comparatively early age of fifty-four. Few names equally brilliant in the law have been earned in so short a life. The work generally known as Buller's Nisi Prius, is a collection of cases made by Mr. Justice (afterwards Lord) Bathurst.

Obituary. — Died, at his residence at the Cherokee Mission, in the Cherokee nation west, Jesse Bushyhead, chief justice of the supreme court of the Cherokees. He was enjoying excellent health on the 12th of July, when he was attacked with the fever of the climate, which continued with but slight changes of improvement until the 17th, when he exchanged his earthly habitation for that of immortality. The subject of this notice was a person of great distinction among his tribe. He was, in his acquirements, a self-made man; he obtained, in his youth, a very limited English education, which he improved, to enable him to be a good English speaker, as well as an able orator in the Cherokee. He was a correct interpreter and translator, and at his demise was extensively engaged in translating English into Cherokee. He has occupied many public stations, which he discharged with fidelity and for the good of his people. His name will live as long as his tribe.

Hotch-Pot.

It seemeth that this word hotch-pot, is in English a pudding, for in this pudding is not commonly put one thing alone, but one thing with other things put together. — *Littleton*, § 267, 176 a.

Hon. Luther S. Cushing has prepared for the press a New Manual of Parliamentary Practice. Having examined the manuscript of this work with considerable care, we take occasion to say, that it will be a valuable accession to the libraries of those who are called upon to preside in deliberative assemblies; and we believe the necessity of such a work as this has been very generally felt in our country, where almost every citizen is occasionally called upon to exercise the duties of a presiding officer. The work is founded upon the well-established rules and customs of the British parliament, and Mr. Cushing divests himself of all local usages prevailing in different parts of this country, maintaining in the outset, that no occasional assembly can ever be subject to any other rules than those which are of general application, or which it specially adopts for its own government; and denying explicitly that the rules adopted and practised upon by a legislative assembly thereby acquire the character of general laws. We understand that the author of this Manual has for some time been engaged on an elaborate treatise upon the parliamentary law, which we do not doubt will be creditable to his learning and industry. Meanwhile, this smaller and more convenient work will be sent out as a manual for practical reference.

A correspondent of the New York Journal of Commerce makes the following statement: The late Chief Justice Marshall and the late Judge Washington of the supreme court of the United States, were both active in the Sabbath school cause. At the age of seventy, the chief justice regarded it as his high honor to walk through the city of Richmond at the head of a Sunday school procession. The present chancellor of the university of New York (Mr. Frelinghuysen,) was a Sunday school teacher while he held the office of attorney-general of New Jersey, and afterwards while a senator in congress; and he may still be seen cheerfully associating with the humblest teachers. The Hon. B. F. Butler was a Sabbath school teacher while holding the office of attorney-general of the United States; and has, at the present time, his Bible class for young men. And the visiter at Saratoga Springs, who will look into the Sabbath school, may there see the Hon. chancellor of the state of New York, (R. H. Walworth,) with other literary gentlemen, animating the young in their Bible investigations.

We have not received the American Law Magazine for October, the Philadelphia Law Magazine, nor the South-western Law Journal. The Western Law Journal for October was punctually received. It contains, among other things, the elaborate opinion of Mr. Justice McLean in the patent case of Morris *v.* Bicknell, relating to the same patent right as the case of Washburn *v.* Gould, in our last number. With this number, the Western Law Journal enters upon the second year of its existence, under flattering auspices. The London Law Magazine for August had not been published when the last steamer sailed. It seems probable that the publication has been suspended.

The vacancy on the bench of the court of common pleas has been filled by the appointment of Luther S. Cushing, of Boston, formerly, and for many years the editor of the American Jurist. Mr. Cushing was also clerk of the house of representatives in Massachusetts for several years, until the last session, when he was chosen a member of that body. He has not been engaged in the practice of the law for many years, but from his former experience at the bar, his accurate and thorough knowledge of the law, and habits of patient labor, we regard his appointment as a great accession to the new court.

Our readers will notice that Messrs. Charles C. Little and James Brown, law booksellers, have made arrangements with the proprietors of this work for the insertion, at the end of each number, of eight pages of notices of new works, relating chiefly to law, and of advertisements of law books. Of course we are in no manner responsible for the contents of this advertising sheet, but at the same time we believe it will be highly useful to our readers in furnishing early and accurate information of new publications, in our own and foreign countries.

Some gentlemen in New York were recently remarking, in the presence of Mr. Webster, upon the disgraceful proceedings in the Helderberg township, which they regarded as in effect a civil war, for which the authorities seemed totally inadequate. "Gentlemen of the empire state," said Mr. Webster, "I would advise you to turn this part of your territory over to the state of Rhode Island, the authorities of which seem well qualified to take proper care of it."

We have received, and shall notice hereafter, the argument of Daniel Wells, Esq. (now chief justice of the common pleas) on the trial of William Wyman, an account of which we gave in our last volume (page 385.)

We are indebted to the kindness of some unknown friend for a copy of the trial of John F. Bradlee in the United States district court for Western Pennsylvania, for robbing the United States Mail in 1840.